TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 192.

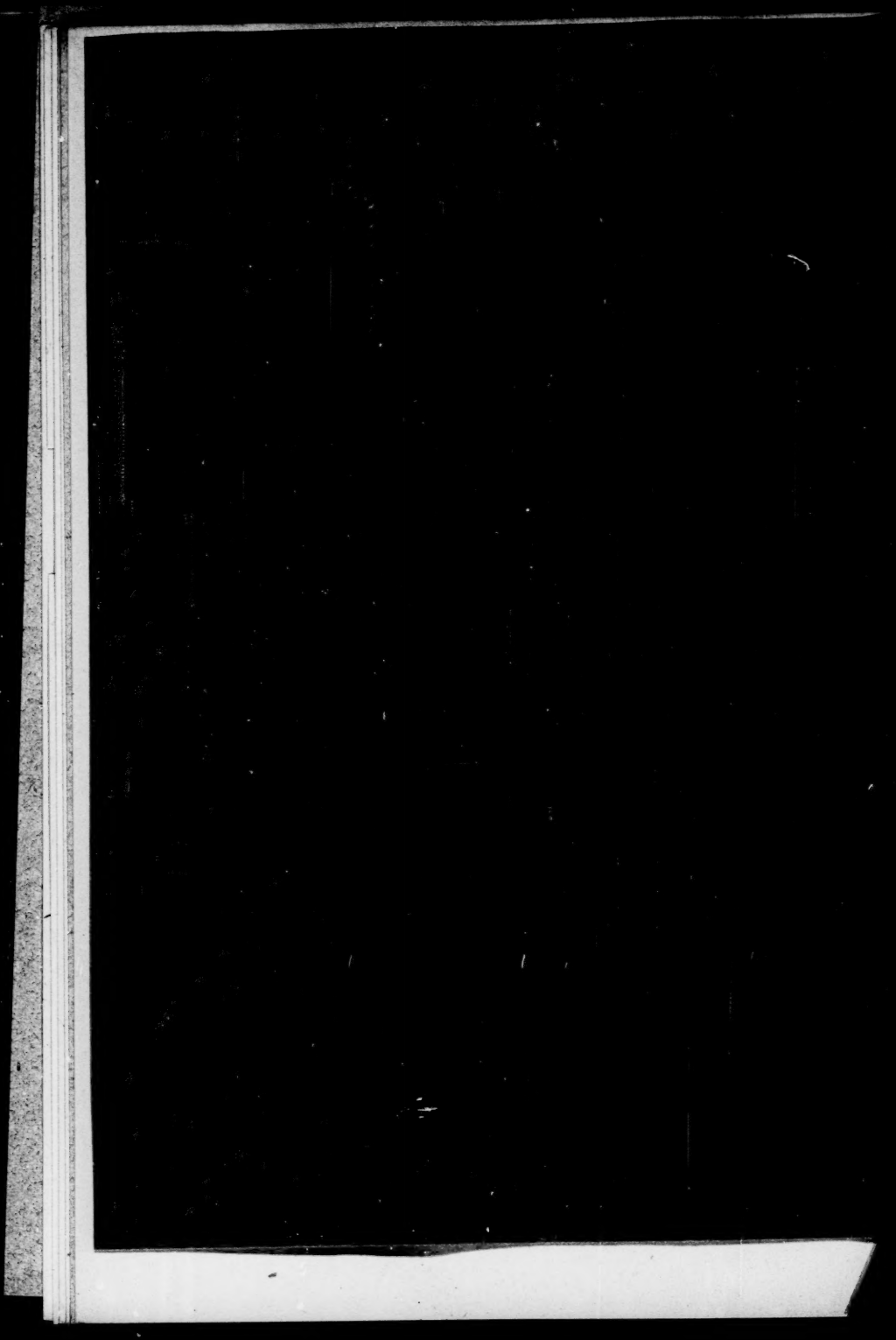
JAMES E. YEATMAN AND JAMES C. MOORE, ASSIGNEES IN BANKRUPTCY OF JAMES J. O'FALLON AND SAMUEL A. HATCH, COMPOSING THE FIRM OF O'FALLON & HATCH, PLAINTIFFS IN ERROR,

vs.

SAMUEL SMITH, ANDREW W. SMITH, AND CHARLES KILSHAW, COMPOSING THE COMMERCIAL FIRM OF SAMUEL SMITH & COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

FILED OCTOBER 12, 1875.



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1 UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and district of Louisiana.

ROBERT K. WOODS, ASSIGNEE, &C., *vs.* SAMUEL SMITH & CO. } No. 6889.

Petition.—Filed January 18th, 1873.

To the hon. the circuit court of the United States for the fifth judicial circuit and district of Louisiana:

The petition of Robert K. Woods, herein acting as the assignee in bankruptcy of the estate of O'Fallon & Hatch and of the members of said firm, respectfully shows to the court that he is a citizen of the State of Missouri and resident of S't Louis in said State; that Samuel Smith & Co., a commercial firm domiciled and doing business in this city and State, and the individual members thereof, viz, Samuel Smith, Andrew W.
2 Smith, & Charles Kelihan, all of whom are citizens of the State of Louisiana, are justly and truly, as a firm and as individuals, in solido, indebted to your petitioner, in his capacity of assignee of O'Fallon & Hatch and of the members thereof, in bankruptcy, in the full sum of fifty-eight thousand three hundred and eleven dollars, and interest thereon from February 28th, 1872, at the rate of eight per cent. per annum until paid; for this, to wit, that O'Fallon & Hatch a copartnership engaged in business in S't Louis, Mo., and in New Orleans, Louisiana, and composed of James J. O'Fallon and Samuel A. Hatch, were adjudged bankrupts, as a firm and as individuals, by the district court of the United States for the eastern district of Missouri, under and in virtue of the act of Congress approved March 2d, 1867, entitled "An act to establish a uniform system of bankruptcy throughout the United States," on the 27th day of November, A. D. 1871.

That on the 20th day of May, 1872, your petitioner was duly appointed assignee of the estate of said bankrupt firm and its members aforesaid; that on the same day the register in bankruptcy for
3 said district court of Missouri did, by proper deed of assignment, convey to petitioner all the property and rights of property of every description belonging to the said firm of O'Fallon & Hatch, in bankruptcy, and to its members aforesaid, or in which they were interested on the 9th day of September, A. D. 1871; all of which will appear from a certified copy of said deed, herewith filed and made part hereof.

That among the assets then belonging to the estate of O'Fallon & Hatch, and conveyed as aforesaid to your petitioner, were a large number of warrants of the State of Louisiana and certificates of indebtedness of said State, a correct list of which is hereto attached and made part hereof, in all amounting to the sum of seventy-seven thousand seven hundred and forty-eight $\frac{35}{100}$ dollars.

That at the time said adjudication of bankruptcy was made as aforesaid and at the time petitioner was appointed assignee as aforesaid, said State warrants were in the possession of the said defendants, Samuel Smith & Co., but that said warrants were all of them the property of said estate and did not belong to said defendant.

4 That, in the months of January and February, 1872, Leonard Matthews, who during said months was the duly appointed and authorized receiver of the estate of O'Fallon & Hatch in bankruptcy,

with full authority from the district court of the United States for the eastern district of Missouri to demand possession of said warrants from defendants and to receive same and sell same for the benefit of said estate, did several times during said months demand (after exhibiting to them his authority from the court aforesaid as receiver and the orders of said court authorizing him to take possession of said warrants and sell same) from the said defendants the possession of said warrants with a view of selling same, as at that time there was a good market for them.

That, on the 28th day of February, 1872, or about that date, he made or caused to be made a final demand of defendants of possession of said warrants and they unlawfully refused to deliver same to him; that at that time said warrants were well worth the sum in the New Orleans market of seventy-five cents on the dollar, in the aggregate amounting to the sum of fifty-eight thousand three hundred & eleven dollars; that your petitioner has also demanded the possession of said warrants from the said defendants since that time and since his appointment, and they have and do unlawfully and wrongfully refuse to deliver same to petitioner, who, in his capacity as assignee, is the proper legal custodian of same and to whom they belong; that defendants have wrongfully used and converted said warrants to their own use and detained them from petitioner.

That they have largely declined in value since the 28th day of February, 1872, and that they justly and truly owe him, as assignee aforesaid, the full sum of fifty-eight thousand three hundred and eleven dollars, and interest thereon from the 28th day of February, A. D. 1872, at the rate of eight per cent. per annum, and that they ought to pay his att'y's fees, amounting to the sum of three thousand dollars, all of which they refuse to pay.

Wherefore petitioner prays that said defendants, Samuel Smith & Co., and Andrew W. Smith, Charles Kelihan, , the individual members thereof be condemned in solido to pay to the petitioner the full sum of fifty-eight thousand three hundred and eleven dollars, and interest thereon from the 28th of February, 1872, at 8% per annum till paid, and the sum of three thousand dollars as his attorney's fees and for all costs and general relief.

(Sign'd) GIVEN CAMPBELL,
Att'y for Pl'ff.

List of warrants and certificates held by Sam'l Smith & Co., referred to in petition of R. K. Woods, assignee of O'Fallon & Hatch, vs. Sam'l Smith & Co.

WARRANTS OF THE STATE OF LOUISIANA.

No. 1596 for $5,000.
" 1597 " $5,000.
" 1598 " $5,000.
" 1599 " $5,000.
" 1600 " $5,000.
" 1167 " $5,000.
" 1168 " $5,000.
" 1169 " $5,000.
" 1172 " $5,000.
" 3525 " $1,063 20.

One certificate of indebtedness of the State of Louisiana, No. 121, dated June 4th, 1870, for $31,685 $\frac{35}{100}$ dollars.

EXHIBIT A.

7 *Citation and marshal's return.—Issued January 18th, 1873.*

The President of the United States of America to the marshal of the district of Louisiana, greeting:

ROBERT K. WOODS, ASSIGNEE, &C., *vs.* SAMUEL SMITH & CO. } No. 6889.

You are hereby commanded to summon the commercial firm of Samuel Smith & Co., composed of Samuel Smith, Andrew W. Smith, & Charles Kelshaw, all of whom are citizens of the State of Louisiana, to comply with the demand of Robert K. Woods, assignee in bankruptcy of O'Fallon & Hatch, and a citizen of the State of Missouri, contained in the petition, of , of which a copy accompanies this citation, or to deliver their answer to the same in the office of the clerk of the circuit court of the United States, fifth judicial circuit and district of Louisiana, in the city of New Orleans, in ten days after service hereof, or judgment will be rendered against them by default, which delay is increased one day for every ten miles the defend-
8 ant's residence is distant from New Orleans, the place where the court is held.

And that you make due return hereof on the first Monday of February, 1873.

Witness the Hon. Salmon P. Chase, Chief-Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 18th day of January, A. D. one thousand eight hundred and seventy-three, and of the Independence of the United States of America the 97th year.

[SEAL.] (Signed) F. B. VINOT, *D'y Clerk.*

Marshal's return.

Received January 21st, 1873, by the U. S. marshal, and on the 23d day of same month and year served a copy of within citation and accompanying petition on Samuel Smith & Co., named herein, by handing the same to Andrew Smith, a member of said firm, at their bank, No. 28 Carondelet street.

New Orleans, January 23d, 1873.

(Signed) S. W. REED, *D'y U. S. Marshal.*

9 *Answer.—Filed February 10th, 1873.*

U. S. circuit court, district of La.

ROBERT K. WOODS, ASSIGNEE OF O'FALLON & Hatch, *vs.* SAMUEL SMITH & CO. } No. 6889.

Now comes the defen'ant, Samuel Smith & Co., and for answer to the plaintiff's petition they deny all and singular the allegations therein contained, except so far as is herein specially admitted and alleged.

Further answering, these defendants aver that they acquired the five certain warrants of the State of Louisiana for five thousand dollars each, numbered 1596, 1597, 1598, 1599, and 1600, mentioned in the plaintiff's petition on or about the 12th May, 1871, under an act of pledge thereof of date the 24th April, 1871, executed by O'Fallon & Hatch to secure the payment of a certain promissory note of date the 24th April, 1871, for twelve thousand five hundred dollars, bearing 8 % interest from maturity, payable nine months after date, drawn by O'Fallon & Hatch to their own order and by them endorsed in blank, then delivered to and held by these defendants for a valuable consideration, and,
10 accordingly, on or about the 12th May, 1871, the said five warrants were pledged, pawned, and delivered to these defendants by the said O'Fallon & Hatch to secure said debt of twelve thousand five hundred dollars, with interest aforesaid, due by them to these defendants.

And, further answering, these defendants aver that they acquired certain warrants of the State of Louisiana, amounting in the aggregate to thirty-one thousand six hundred and eighty-five $\frac{35}{100}$ dollars, under date of the 3rd of April, 1871, for which were exchanged the certificates of like amount mentioned in the plaintiff's petition on or about the 12th of May, 1871, under an act of pledge thereof of that date, executed by O'Fallon & Hatch by their duly authorized agent, J. E. Kelso, to secure the payment of a certain promissory note of same date for fifteen thousand eight hundred dollars, bearing 8 % interest per annum after date, drawn by O'Fallon & Hatch, by their duly authorized agent and attorney in fact J. E. Kelso, and by them duly endorsed in blank by their said agent and attorney in fact, then delivered to and held by these defendants for a valuable consideration, and, accordingly, on or
11 about 12th May, 1871, the said last-mentioned warrant, amounting to $31,685.35, were pledged, pawned, and delivered to these defendants by the said O'Fallon & Hatch to secure said debt due by them to these defendants.

And, further answering, these defendants aver that they acquired the four certain warrants of the State of Louisiana for five thousand dollars each, numbered 1167, 1168, 1169, 1172, and the warrant of the State of Louisiana for one thousand and sixty-three $\frac{20}{100}$ dollars mentioned in the plaintiff's petition on 10th May, 1871, under an act of pledge thereof of that date, executed by O'Fallon & Hatch to secure the payment of a certain promissory note of same date for twenty-six thousand seven hundred and nineteen $\frac{25}{100}$ dollars, bearing 8 % interest per annum from date, payable on demand, drawn by O'Fallon & Hatch to the order of these defendants, then delivered to and held by these defendants for a valuable consideration, and, accordingly, on said 10th May, 1871, the said warrant for one thousand and sixty-three $\frac{20}{100}$ dollars and said four warrants last mentioned were pledged, pawned, and delivered to these defendants by the said O'Fallon & Hatch to secure their said debt to these defendants.

12 And these defendants aver that of all said promissory notes they are holders and owners for value aforesaid, the same are due and unpaid, and these defendants hold said warrants, pledged as aforesaid, to secure the payment of said notes.

And, further answering, these defendants aver that in January, 1871, the said O'Fallon & Hatch were indebted to these defendants in a large sum, of which the said $26,719.25 formed a part; that at that date said O'Fallon & Hatch had in the hands of L. F. Générés, of this city, certain securities of the State of Louisiana, amounting to ninety-six thousand and six $\frac{07}{100}$ dollars, on which they had obtained certain loans; that,

as an additional security for the said indebtedness to these defendants, the said O'Fallon & Hatch, on the 2d January, 1871, pledged said securities and their proceeds in the hands of said Générés, subject to said prior claim upon said securities for said loans obtained thereon, and accordingly said O'Fallon & Hatch, on said 2d January, 1871, gave to these defendants an order upon said Générés to hold said securities then in his hands, subject to the demand of these defendants upon the
13 payment of said previous loans thereon, of which pledge and order said Générés was duly notified and with which he promised compliance.

That the said five warrants, pledged for said note of $12,500.00, and the aforesaid warrants aggregating $31,685.35, pledged for said note of $15,800.00, formed part of said securities originally in the hands of said Générés, or were obtained by said Générés while said securities were in his hands in exchange for a like amount of said securities; that on the execution of said note for $26,719.25, all the rights of these defendants under said pledge of 2d January, 1871, were reserved and maintained for the payment of said last-named amount; that, accordingly, when these defendants acquired said five warrants for five thousand dollars each, and said warrants aggregating thirty-one thousand six hundred and eighty-five $\frac{35}{100}$ dollars under said pledges to secure the aforesaid promissory notes of $12,500.00 and of $15,800.00, respectively, the said warrants were also subject to said previous pledge to secure said $26,719.25, and defendants have therefore a pledge upon said warrants last mentioned, not only to secure said notes of $12,500.00
14 and of $15,800.00, but also for said note of $26,719.25.

These defendants specially deny the capacity and authority of Leonard Matthews, alleged in plaintiff's petition.

Wherefore defendants pray for judgment in their favor.

(Signed) LEA, FINNEY & MILLER,
Attorneys for Defendants.

Amended answer.—Filed February 18th, 1873.

U. S. circuit court, dist. of Louisiana.

R. K. WOODS, ASSIGNEE, &C., *vs.* SAMUEL SMITH, & CO. } No. 6889.

This amended answer of the defendants respectfully shows:

That it is alleged in the petition of the plaintiff that one Matthews, the receiver of the assets of O'Fallon & Hatch, made a demand of defendants on the 28th of February, 1872, for the possession of the warrants and certificates in the petition mentioned as belonging to the bankrupts, and that at that time the said securities were worth $58,311.00, and that delivery of the same was refused by defendants.

Now these defendants, denying that the said Matthews had any
15 right to the said warrants and certificates, or any right to take the same out of the possession of the defendants, but averring that the said securities were in the lawful possession of defendants under acts of pledge duly made; and denying also that the said certificates and warrants were worth $58,311.00, as alleged, nevertheless, say that on the said 28th day of February, 1872, the debt due the defendants,

and for which the said securities were pledged to them, amounted to $57,021.18, and that they were always ready and willing, and offered to surrender the said securities to the said Matthews, or to any one who would pay their debt.

They further say that their said debt, for which the securities, warrants, and certificates in the petition mentioned were pledged, amounted on the day that plaintiff's petition was filed to a sum exceeding the value of the said securities, estimated at 75 cents on the dollar, with interest as claimed, and defendants are now ready and willing, and do now offer to surrender to the said plaintiff all of the certificates
16 and warrants mentioned in the petition upon the payment of the debt, with interest, now due.

Wherefore they pray that plaintiff's suit be dismissed, with costs.

HUNTON & GROVER,
Att'ys for Def'ts.

Order.

Let this amended answer be filed.
Febr'y 18th, 1873.
(Signed) E. H. DURELL, *Judge.*

Waiver of jury.—Filed May 22d, 1873.

Circuit court of the U. S. dist. of La.

R. K. WOODS, ASSIGNEE, &C., *vs.* SAMUEL SMITH & CO. } No. 6889.

SAME *vs.* L. F. GÉNÉRÉS. } No. 6890.

SAME *vs.* N. O. SAVINGS INSTITUTION. } No. 6886.

SAME *vs.* D'R W'M N. MERCER. } No. 6887.

SAME *vs.* JOHN A. TURNELL. } No. 6888.

17 We agree to waive the jury in these cases, and that the same shall be tried by the court.

(Signed) LEA, FINNEY & MILLER,
For S. Smith & Co.

(Signed) CLARKE, BAYNE & RENSHAW,
For other Defendants.

(Signed) GIVEN CAMPBELL, *Att'y for Plaintiff.*

Continuance of cases.—Extract from the minutes, May 22d, 1873.

Circuit court of the United States, fifth circuit and district of Louisiana, April term, 1873.

NEW ORLEANS, *Thursday, May 22d*, 1873.

Court met pursuant to adjournment.
Present, Hon. E. H. Durell, district judge.

R. K. WOODS, ASSIGNEE, &c., *vs.* S. SMITH & CO. } No. 6889.

SAME *vs.* L. F. GÉNÉRÉS. } No. 6890.

SAME *vs.* NEW ORLEANS SAVINGS INSTITUTION. } No. 6886.

SAME *vs.* D'R W'M N. MERCER. } No. 6887.

SAME *vs.* JOHN A. TURNELL. } No. 6888.

18 In the above cases the attorneys this day filed a stipulation waiving the jury, and agreed to try the causes before the court on Monday, 26th instant, at 11 a. m., for which day they are specially assigned.

Hearing and continuance of case.—Extract from the minutes, May 26th, 1873.

R. K. WOODS, ASSIGNEE, &C., *vs.* SAM'L SMITH & CO. } No. 6889.

This cause was called for trial.
G. Campbell for plaintiff.
Lea, Finney & Miller and Hunton & Grover for defendants.
When the cause was considered partially opened and continued till to-morrow at 11 a. m.

Hearing and continuance of case.—Extract from the minutes, May 27th, 1873.

R. K. WOODS, ASSIGNEE, &C., *vs.* SAM'L SMITH & CO. } No. 6889.

For want of time this case is, by consent of counsel, continued till to-morrow at 11 a. m.

19 *Hearing and submission of case.—Extract from the minutes of May 28th, 1873.*

R. K. WOODS, ASSIGNEE, &C., *vs.* SAM'L SMITH & CO. } No. 6889.

This cause came up agreeably to continuance.
Given Campbell for plaintiff.
Lea, Finney & Miller and Hunton & Grover for defendants.
When, after hearing the pleadings, evidence, and counsel, the court took time to advise.

Order; case reinstated and fixed.—Extract from the minutes, Dec'r 9th, 1873.

Circuit court of the United States, fifth circuit and district of Louisiana.
November term, 1873.

NEW ORLEANS, *Tuesday, December 9th*, 1873.

Court met pursuant to adjournment.
Present, Hon. E. H. Durell, district judge.

R. K. WOODS, ASSIGNEE, &C., *vs.* SAM'L SMITH & CO. } No. 6889.

SAME *vs.* L. F. GÉNÉRÉS. } No. 6890.

SAME *vs.* NEW ORLEANS SAVINGS INstitution. } No. 6886.

20 SAME *vs.* D'R W'M N. MERCER. } No. 6887.

SAME *vs.* JOHN A. TURNELL. } No. 6888.

Ordered, that the above causes, submitted at the last term of the court, be reinstated for further argument on the 30th instant at 11 a. m., and that all parties be notified thereof.

Motion and order; case continued.—Extract from the minutes, January 10th, 1874.

R. K. WOODS, ASSIGNEE, &C., *vs.* SAM'L SMITH & CO. } No. 6889.

SAME *vs.* L. F. GÉNÉRÉS. } No. 6890.

SAME
vs.
NEW ORLEANS SAVINGS INstitution. } No. 6886.

SAME
vs.
D'R W'M N. MERCER. } No. 6887.

SAME
vs.
JOHN A. TURNELL. } No. 6888.

On motion of Given Campbell, attorney for plaintiff, ordered,
21 that the above cases be set for further argument on the 16th instant at 11 a. m., and that defendant be notified thereof.

Hearing and continuance of case.—Extract from the minutes, January 16th, 1874.

R. K. WOODS, ASSIGNEE, &C.,
vs.
SAM'L SMITH & CO. } No. 6889.

SAME
vs.
L. F. GÉNÉRÉS. } No. 6890.

SAME
vs.
N. O. SAVINGS INSTITUTION. } No. 6886.

SAME
vs.
D'R W'M N. MERCER. } No. 6887.

SAME
vs.
JOHN A. TURNELL. } No. 6888.

The above cases were called for re-argument pursuant to order.
Present, Given Campbell, for plaintiff.
" Finney & Miller, and Clar'e, Bayne & Renshaw, for defendants.
When, after hearing Given Campbell and H. C. Miller, esq'r's, ordered, that the further hearing be continued till the 19th instant, at 11 a. m.

22 *Hearing and submission of case.—Extract from the minutes, January 19th, 1874.*

R. K. WOODS, ASSIGNEE, &C.,
vs.
SAM'L SMITH & CO. } No. 6889.

SAME
vs.
L. F. GÉNÉRÉS. } No. 6890.

SAME
vs.
NEW ORLEANS SAVINGS INSTITUTION. } No. 6886.

SAME
vs.
D'R W'M N. MERCER. } No. 6887.

SAME
vs.
JOHN A. TURNELL. } No. 6888.

The above causes were resumed, and, after hearing further argument, the court took time to advise.

Judgment.—From judgment-book, March 7th, 1874.

Circuit court of the United States, fifth circuit and district of Louisiana.
November term, 1873.

NEW ORLEANS, *Tuesday, March 3rd*, 1874.

Court met pursuant to adjournment.
Present, Hon. W. B. Woods, circuit judge.
Do Hon. E. H. Durell, district judge.

23 R. K. WOODS, ASSIGNEE, &C.,
vs.
SAM'L SMITH & CO. } No. 6889.

For reasons orally assigned by the court, it is ordered, adjudged, and decreed that judgment be entered for the defendants, with costs.
Judgment rendered March 3rd, 1874.
Judgment signed March 7th, 1874.
(Signed) E. H. DURELL, *Judge.*

Statement of facts by the court.—Filed June 9th, 1874, nunc pro tunc, as of March 3d, 1874.

Circuit court of the United States, fifth circuit & district of Louisiana.

R. K. WOODS, ASSIGNEE, &C.,
vs.
SAMUEL SMITH & CO. } No. 6889.

This case came up this day to be tried.
Present, Given Campbell for R. K. Woods, assignee, and Lea, Finney & Miller for Samuel Smith & Co.
After hearing evidence and argument, and upon counsel filing a stipulation for the waiver of the jury, the court finds the following facts, to wit:

24 On the 2nd January, 1871, O'Fallon & Hatch, a commercial firm domiciled in New Orleans, became indebted to Sam'l Smith & Co. in the sum of one hundred and eleven thousand one hundred and sixty-six $\frac{27}{100}$ dollars, ($111,166.27,) for which amount said O'Fallon & Hatch, as makers, executed their promissory note in favor of defend-

ants, payable on demand, and bearing 8% per annum interest from that date, which note was delivered to defendants for said indebtedness.

To secure the payment of that note, O'Fallon & Hatch, on the same date, executed an act of pledge to the defendants upon certain securities, described in the pledge as certificates of indebtedness of the State of Louisiana, in the hands of L. F. Générés, amounting to ninety-six thousand six $\frac{07}{100}$ dollars, ($96,006.07,) which pledge was accepted by the defendants as security for said indebtedness due to them; copy of said pledge, marked "A," is hereto annexed and made part of this statement.

These certificates of indebtedness, amounting to ninety-six thousand and six $\frac{07}{100}$ dollars, ($96,006.07,) belonging to defendants, had been placed by them in the hands of L. F. Générés a short time previous to the 2d January, 1871, for the purpose of obtaining loans for O'Fallon and Hatch upon pledges of the certificates which Générés was authorized by O'Fallon & Hatch to make.

25 At the date of the pledge to defendants the certificates were already pledged to secure loans, maturing or matured, to O'Fallon & Hatch, effected through Générés, and in accordance with his authorization, to the extent of 50c. on the dollar of the face value of the certificates, and the pledge to defendants was subject to this prior pledge to secure the 50c. on the dollar already loaned on them. Générés had authority from defendants to take up and relieve the securities from the subsisting pledges, to which end he had authority to pledge them anew as often as occasion required for fresh loans to procure the funds required to discharge the previous loans and pledges.

From Générés' relation and authority in the premises he could obtain possession of the securities on paying the prior loans of 50 c'ts on the dollar on them.

On the same date of the p'edge, 2nd January, 1871, O'Fallon & Hatch gave to the defendants a written order upon Générés, notifying him of this pledge, and instructing him to hold the securities subject to defendants' order, which order, on same date, was duly presented to

26 him by the defendants and he then promised compliance with it; copy of which order is hereto attached, marked "B," and made part hereof.

Subsequent to the date of the pledge and order upon him and his acceptance of it, Générés did have the actual possession of the certificate of indebtedness hereafter mentioned for thirty-one thousand six hundred and eighty-five $\frac{35}{100}$, ($31,685.35,) and of the five warrants of the State of Louisiana hereafter mentioned for five thousand dollars each, ($5,000,) belonging to O'Fallon & Hatch, being a portion of the securities placed in his hands, embraced in the pledge and order upon him, and encumbered by the prior pledges of 50c. on the dollar in favor of others; and these five warrants and certificates were delivered by him to defendants upon their advancing him, under the additional pledges hereinafter referred to, the funds required to discharge the prior pledges on these securities, the five warrants having been exchanged for an equivalent amount of the original certificates of indebtedness stated in the pledge and order, the exchange having been made in accordance with law, with the assent of

27 all parties in interest, for the reason that warrants were deemed more available than certificates.

On the 10th May, 1871, the indebtedness of O'Fallon & Hatch of $111,166.27 to the defendants was reduced to twenty-six thousand seven hundred and nineteen $\frac{25}{100}$ dollars (26,719.25,) for which amount, on that date, O'Fallon and Hatch executed their promissory note in favor of defendants, payable on demand, and bearing 8% per annum interest

from date, which note was duly delivered to defendants for said indebtedness; to secure the payment of this note of twenty-six thousand seven hundred and nineteen $\frac{25}{100}$ dollars, ($26,719.25,) the original pledge upon the securities, amounting to ninety-six thousand and six $\frac{07}{100}$ (96,006.07,) in the hands of Générés, was maintained in force, and was repeated in the pledge of date 10th May, 1871, executed to secure the note of twenty-six thousand seven hundred and nineteen $\frac{25}{100}$ dollars, and O'Fallon and Hatch also pledged, pawned, and delivered to the defendants, to secure the payment of this last note, five warrants of the State of Louisiana, numbered 1167, 1168, 1169, 1172, and 3525, four of which were for $5,000, and one of which was for $1,063.20, aggregating $21,063.20.

Upon the execution of this note of $26.719.25, that of $111,166.27 was delivered up to O'Fallon & Hatch.

28 On the 10th May, 1871, the defendants therefore held, to secure the note of twenty-six thousand seven hundred and nineteen $\frac{25}{100}$ dollars, the five above warrants, aggregating $21,063.20, pledged, pawned, and delivered into the defendants' actual possession, and they had the pledge upon the securities in the hands of Générés and the subject of the pledge and order upon him with which he had promised compliance, and said note and pledge for twenty-six thousand *thousand* seven hundred and nineteen $\frac{25}{100}$ dollars ($26,719.25), are filed with defendants' answer, and referred to and made part of this statement.

In this condition of things, Générés proposed to the defendants that they should discount two promissory notes executed by O'Fallon and Hatch as the makers thereof: one for twelve thousand five hundred dollars, ($12,500,) dated 24th April, 1871, and payable nine months after date, and another promissory note dated 12th May, 1871, and payable eight months after date, for fifteen thousand eight hundred dollars, ($15,800,) both drawn to the order of O'Fallon & Hatch, by them endorsed in blank, and bearing 8 % per annum interest after their maturity,

29 upon pledges of a portion of the securities embraced in the pledge and the order upon him of date 2d January, 1871.

The inducement he held out to the defendants was, as they already had a pledge upon these securities to secure the note of twenty-six thousand seven hundred and nineteen $\frac{25}{100}$ dollars, ($26,719.25,) subject to the prior loans of 50c. on the dollar, by discounting the notes of twelve thousand five hundred dollars, ($12,500,) and fifteen thousand eight hundred dollars, ($15,800,) the defendants would thereby reduce their actual possession under the new pledges; a portion of these securities already pledged to them for the note twenty-six thousand seven hundred and nineteen $\frac{25}{100}$ dollars ($26,719.25.)

The defendants yielded to this inducement, and accordingly Générés, as agent of O'Fallon and Hatch, and in accordance with his authority from them, pledged, pawned, and delivered to the defendants five warrants of the State of Louisiana, for five thousand dollars each, to secure the payment of the aforesaid promissory note of twelve thousand five hundred dollars, ($12,500,) and, as agent of O'Fallon & Hatch and in accordance with his authority from O'Fallon and Hatch,

30 pledged, pawned, and delivered to the defendants the certificate of indebtedness of the State of Louisiana, amounting to thirty-one thousand six hundred and eighty-five dollars, ($31,685,) to secure the payment of the aforesaid note of fifteen thousand eight hundred dollars, ($15,800,) and said acts of pledge and notes were duly executed and delivered to defendants and are filed with defendants' answer, to which

reference is made, and said notes and pledges are hereby made part of this statement.

The defendants discounted these notes at the usual market rate, paying the proceeds to Génerés as defendants' agent, and thereby becoming the holders of the notes for value, said notes were duly delivered to the defendants. Génerés, in accordance with his authority from O'Fallon and Hatch, applied the proceeds derived from the defendants discounting these last notes of $12,500 and $15,800, in discharging the previous loans and pledges of the securities, of which the defendants obtained actual possession by discounting these notes.

When the defendants obtained possession of the five warrants of $5,000 each and the certificate of $31,685.35, under the pledges
31 to secure the notes of $12,500 and $15,800, these last securities were pledged to defendants for the notes of $12,500 and $15,800, and also for the note of $26,719.25, being pledged for the last note at and prior to the discounting of the two notes of $12,500 and of $15,800. And defendants also held, as pledges for the note of $26,719.25, the five warrants, aggregating $21,063 20, already mentioned.

By agreement with O'Fallon and Hatch, defendants charged interest at the rate of 18 % as a consideration for extending payment of the demand-note of one hundred and eleven thousand one hundred and sixty-six $\frac{27}{100}$ dollars ($111,166.27.) On the 16th February, 1871, defendants rendered their account to O'Fallon and Hatch, charging them interest at the agreed rate of 18 % on $111,166.27, from 2nd January, 1871, to 11th February, 1871, crediting O'Fallon and Hatch with the cash payment of eighty-seven thousand six hundred dollars ($87,600) on that date, which was deducted from the blended amounts of principal and interest, and the balance brought down due to the defendants, twenty-five thousand eight hundred and forty-four $\frac{15}{100}$ dollars ($25,844.15,) on which interest was charged at the agreed rate, 18 %, to 16th February, 1871, when defendants were credited with a cash payment
32 of two hundred and fifty-four $\frac{20}{100}$ dollars, which was deducted from the blended amounts of principal and interest, and the cash balance due defendants on the 16th of February, 1871, was struck, fixed, and adjusted at twenty-five thousand six hundred and fifty-four $\frac{57}{100}$ dollars, ($25,654.57.) This account, and this balance of indebtedness exhibited by it, was acquies'ed in and agreed to by O'Fallon and Hatch.

On the 10th May, 1871, the defendants rendered another account to O'Fallon & Hatch, in which they charged interest on the balance shown by the last account at the rate of 18 % from the 16th February, 1871, the close of the last account, to the 10th May, 1871, which, added to the balance of twenty-five thousand six hundred and fifty-four $\frac{57}{100}$ dollars ($25,654.27,) exhibited a cash balance due defendants of twenty-six thousand seven hundred and nineteen $\frac{25}{100}$ dollars ($26,719.25,) which account and the said balance struck and exhibited by said account was acquies'ed in and agreed to by O'Fallon and Hatch, and on that date, 10th May, 1871, O'Fallon & Hatch executed and delivered to defendants the promissory note of twenty-six thousand seven hundred and nineteen $\frac{25}{100}$ dollars ($26,719.25) for the indebtedness exhibited by
33 said account; and the accounts of defendants are hereby attached, and marked D, E, & F, and made part thereof.

By mercantile custom, when accounts are rendered exhibiting partial payments and interest charges, the interest is carried into and included in the balance of indebtedness exhibited by the close of the account.

When the account is acquies'ed in by the debtor to whom it is ren-

dered, the balance, made up of principal and interest, is treated as a cash balance; thus carried into the succeeding account, upon which interest is charged and included as part of the balance of indebtedness exhibited by and brought down by the succeeding account rendered, and the accounts are thus continued until closed by payment or by the debtor giving a promissory note. The accounts of defendants were made up in accordance with this customary mode and the agreement of the parties.

The promissory notes of twenty-six thousand seven hundred and nineteen $\frac{25}{100}$ dollars, ($26,719.25,) one of twelve thousand five hundred dollars, ($12,500,) and one of fifteen thousand eight hundred dollars,
34 ($15,800,) with interest at the rate of 8 % per annum from their maturities, are still unpaid and duly protested for non-payment; and said promissory notes at the date of the institution of this suit were and are now still held by and due to the defendants, by O'Fallon & Hatch, the makers of said promissory notes, and secured by said pledges delivered to and held by defendants.

On the 27th day of November 1871, O'Fallon and Hatch were duly adjudicated bankrupt, by a decree of the district court of the United States for the eastern district of Missouri upon a creditor's petition.

When said firm was adjudicated bankrupts they owned the securities hereinbefore mentioned, subject to pledges herein stated in favor of defendants, and surrendered them as part of their assets.

On the 2nd day of December, 1871, Leonard Matthews was appointed receiver of the estate of said bankrupts by said district court of Missouri, as will appear from a copy of the order appointing him, hereto attached and made part hereof, marked "E," and on the same day another order of said district court of Missouri was made, a copy of which is hereto attached, marked "F." The appointment of Matthews was ex parte, without notice to defendants, and the powers granted
35 to him were obtained by him ex parte, without notice to the defendants. Armed with these orders, the receiver came to New Orleans and at different times, between the 10th December, 1871, and the 27th February, after having exhibited his aforesaid documents to the defendants, demanded the surrender and delivery of the State warrants and certificates of indebtedness aforesaid to him, to be sold, at the same time stating to the defendants that they could prove up their debts as required by the bankrupt law, and follow the proceeds into the Missouri court aforesaid; which the defendants constantly refused to do, being unwilling to go to Missouri to prove up their debts and have their liens adjusted, offering to surrender the securities if the receiver would first pay the notes held by them as aforesaid, which said receiver told them he could not do.

Defendants claimed the right to hold the securities pledged to them until the pledged debts were paid, and offered to deliver them to the receiver on that payment being made, and defendants refused to part with the securities until paid the pledged debts.

Then, on the 27th February, 1872, said United States district
36 court for the State of Missouri ordered, authorized, and empowered said receiver to sell such warrants and certificates, (held as aforesaid,) which he might receive, for not less than 72 per cent. for warrants and 60 per cent. for certificates, and to receive and hold the proceeds subject to the order of said court, reserving all rights of the pledges. This order of the district court was also ex parte and without notice to the defendants.

A copy of said order is hereto attached, and is as follows:

United States district court, eastern district of Missouri. In bankruptcy.

IN THE MATTER OF JAMES J. O'FALLON AND Samuel A. Hatch, bankrupts. } No. 949.

Duly certified copy of the order of 27th February, A. D. 1872, allowing sale of certificates and warrants of the State of Louisiana in the above-entitled matter.

At S't Louis, in said district, Tuesday, 27th February, A. D. 1872.

This day comes Leonard Mathews, receiver herein, and presents to the court his petition, this day filed herein, praying an order for the sale of the warrants and certificates of indebtedness of the State of Louisiana which have been pledged for debts by said bankrupts; and
37 the court, having heard said petition, and being fully advised in the premises, doth order that said Leonard Mathews, receiver, aforesaid, be and he is hereby authorized and empowered to sell and transfer all such warrants and certificates as may be delivered to him for that purpose by the holders thereof, at a price not less than seventy-two (72) per cent. for warrants, and sixty (60) per cent. for certificates, and to receive the proceeds thereof, to be by *lieu* held subject to the future order of this court, reserving to said holders the same right of liens upon such proceeds as they may have upon said warrants and certificates, and to have the said proceeds applied, as far as necessary, in payment of their debts, upon due proof and allowance of such debts and securities in this court.

That on the 28th February, 1872, made another demand for said certificates, through Carl Kohn, president of the Union Bank of New Orleans, when the defendants again refused to surrender to said receiver the said warrants and certificates held by them, as aforesaid, and they again refused to go to S't Louis and have their debts proved and recognized as secured debts of said estate; that at said dates, 27th,
38 28th, and 29th days of February, 1872, defendants claimed the right to hold pledged securities until the pledged debts were paid, and offered to deliver them to the receiver on that payment being made; and defendants refused to part with the securities until paid their pledged debts.

These warrants at said dates were worth in New Orleans, L'a, at the rate of seventy-two (72) cents for warrants and sixty-two (62) cents for certificates, on the dollar; and they continued to rise in value until the month of April, 1872, when they rose to the price of about seventy-five (75) cents on the dollar, and after that period they declined in value; and on the 17th June, 1872, they were worth in the market, at New Orleans, L'a, sixty-two $\frac{50}{100}$ per cent. for warrants, and certificates about five points less.

The defendants, under their pledge, have disposed of $32,000 of the pledged securities; for $15,000 of those disposed of, defendants received seventy-nine (79c.) cents on the dollar; for the residue disposed of, defendants received fifty (50c.) cents on the dollar; the round value for all those disposed of was seventy-two (72c.) cents on the dollar, which value, 72c. on the dollar of the $32,000 disposed of, is to be credited
39 on the notes secured by the pledges.

Defendants hold in their possession, under their pledges, the residue of the pledged securities; that is, all except the said amount disposed of.

On the 20th May, 1872, the plaintiff was appointed and qualified as assignee of said bankrupts, O'Fallon and Hatch, and rereceived from the court a deed of assignment of all their assets. On the 7th June, 1872, the said district court of Missouri authorized and directed plaintiff to adjust or compromise all claims to any effects belonging to said estate, and to sell at public or private sale any collaterals belonging to said estates, said to be pledged for certain demands against said estates and now in possession of certain persons residing in said State of Louisiana, claiming to be creditors of said estates. All orders, powers, and authorities granted to the assignee were ex parte, and without notice to defendants.

That plaintiff proceeded to New Orleans on said business, arriving in New Orleans about the 17th June, 1872; had an interview with one of the firm of Sam'l Smith and Co.; after presenting his authority
40 and the certified copies of aforesaid orders of said Missouri court, demanded from said defendants the surrender to him of the said collaterals, so that they might be sold by him, at the same time saying to the defendants that they could prove their debts, and he would then be in a position in which he could settle with them; that he could not recognize their debts unless they proved up their debts according to law.

The defendants refused to surrender said collaterals to him or to prove up their debts in bankruptcy; and have never proved up their debts in the bankruptcy proceedings.

Defendants claimed the right to hold the pledged securities until the pledged debts were paid, and offered to deliver them to the assignee upon the payment being made, and defendant refused to part with the securities until paid the pledged debts. At the dates of the demands of the receiver and assignee and of Carl Kohn, the defendants were willing, and offered to the receiver and assignee, to permit the pledged securities to be sold, provided the pledged debts were paid out of
41 the proceeds upon the sale being effected; but these offers were declined. The position of the assignee and receiver was that they could not recognize the debts at all until proved in the bankruptcy proceedings, and that the pledged securities must be delivered up by the defendants.

Defendants were convinced that said warrants ought to have been sold in February and March, 1872. Defendants believed and it was expected that the pledged securities would go higher than their then market-value, at the dates of the demands of the receiver, Carl Kohn, and of those of the assignee. The pledged debts due to defendants were and are still wholly unpaid, and at the dates of said demands defendants held the pledged securities demanded of them under the pledge for the payment of the said debts.

Defendants have yet the possession of all said pledged collaterals under these pledges so far as they have not disposed of them under the pledges.

And now, in consideration of the foregoing facts, it is ordered, adjudged, and decreed, that judgment be entered in favor of the defendants with cost.

(Signed) E. H. DURELL, *Judge.*

42 *Pledge marked "A," referred to in statement of facts.*

Know all men by these presents, that whereas Samuel Smith & Co. have this day discounted our note for the sum of one hundred and eleven thousand one hundred and sixty-six dollars and twenty-seven

cents, drawn to the order of Samuel Smith & Co., dated January 2d, 1871, and made payable on demand, with interest at the rate of eight per cent. per annum from date, and commissions for advancing, at the rate of ten per cent. per annum, and have also loaned us five thousand dollars in Louisiana State warrants, returnable on demand.

Now, in order to secure the punctual payment of said note at maturity, we do, by these presents, pledge, pawn, and deliver to said Samuel Smith & Co., ninety-eight thousand five hundred and ninety-one dollars and forty-seven cents in Louisiana State levee warrants, viz :

No. 295, for	$1,737 45
No. 35, for	$1,063 20
No. 34, for	$2,377 05
No. 31, for	$51,554 02
No. 343, for	$12,738 50
No. 37, for	$1,012 55
No. 318, for	$3,793 70
No. 304, for	$2,315 00
No. 342, for	$22,000 00
	$98,591 47

Certificate of indebtedness of the State of Louisiana, No. 120, issued June 4th, 1870, to S. L. James, Tom Bynum, J. J. O'Fallon, and
43 S. A. Hatch, assignees for twenty-five thousand dollars, ($25,000.)

Certificates of indebtedness of the State of Louisiana, deposited in the hands of L. F. Générés, amounting to ninety-six thousand and six dollars and seven cents, ($96,006.07.)

Upon which certificate said L. F. Générés, has advanced us fifty cents on the dollar. These certificates are pledged, subject to conditions, in our order on L. F. Générés, of this date.

And we do hereby consent and agree, that, in case our said note shall not be punctually paid on demand, the said Samuel Smith & Co. shall have the right to sell and transfer the securities so pledged, for cash, at public or private sale, at the option of said Samuel Smith & Co., without the intervention of courts of justice; and the proceeds of such sale shall be appropriated to the payment of our said note and all costs and charges attending the sale.

Witness our hands, at New Orleans, this second day of January, A. D. 1871. In the presence of witness, C. C. Lewis.

(Signed) O'FALLON & HATCH.

Copy of order marked "B," referred to in statement of facts.

NEW ORLEANS, *January 2d*, 1871.

44 L. F. GÉNÉRÉS, Esq.:

DEAR SIR: We are indebted to Samuel Smith & Co., for money advanced us on securities, which, if sold at present prices, would not produce money enough to pay our debt in full.

Now, in order to give to the said Samuel Smith & Co. additional security for our indebtedness, and for money advanced us this day, we hereby pledge to the said Samuel Smith & Co. the ninety-six thousand and six dollars and seven cents in certificates of indebtedness of the State of Louisiana, upon which you have negotiated loans for us to the extent of fifty cents on the dollar; and you will please hold, subject to the order of said Samuel Smith & Co., the certificates of indebtedness or the proceeds of same upon their paying you the amount due on the same.

(Signed) O'FALLON & HATCH.

Accounts of defendant referred to in the statement of facts marked "D," "E," & "F."

ACCOUNT D.

JANUARY 2D, 1871.

O'FALLON & HATCH:

Open account with Sam'l Smith & Co.

45 D.

Balance account rendered June 8th, 1870		$102,166 26
June 18th, 1870, check paid		3,810 54
Do.	do.	1,150 00
June 20th, 1870,	do.	1,100 00
June 21st, 1870,	do.	3,006 00
June 22d, 1870,	do.	2,655 12
July 9th, 1870,	do.	15,000 00
		$128,887 92

CREDIT.

June 17th, 1870, by due-bill, O'Fallon & Hatch	$10,000 00	
July 8th, 1870, exchange	14,962 00	
August 27th, 1870, proceeds levee warrants	11,830 00	
January 3rd, 1871, amount included in O'Fallon & Hatch's demand-note for balance	92,095 42	
		$128,887 92

Demand-note, January 3d, 1871		$111,166 27
To settle open account from December, 1869.	$92,095 42	
To settle demand-note	10,000 00	
To settle com'n and interest	9,070 85	
		$111,166 27

ACCOUNT E.

FEBRUARY 16TH, 1871.

Mess'rs O'Fallon & Hatch in account with Sam'l Smith & Co.

46 E.

Amount due-bill dated January 2d, 1871	$111,166 27
Interest on commission to February 11, 41 days, at 18 per cent	2,277 88
	$113,444 15
February 11th, by proceeds, bonds	87,600 00
Balance due February 11th	$25,844 15
Interest and commission to February 16th, 5 days, at 18 per cent	64 62
	$25,908 77
February 16th, by cash	254 20
Balance cash due	$25,654 57

ACCOUNT F.

MAY 10TH, 1871.

Mess'rs O'Fallon & Hatch, to Sam'l Smith & Co., D'r.

To balance due on note $111,166.27 per statement rendered February 16th	$25,654 57
Interest and commission to May 10th, 1871, say 83 days, at 18 per cent	1,064 68
Due in cash May 10th, 1871	$26,719 25

Copy of order appointing L. Matthews receiver.—Referred to in statement of facts, marked "E."

In the district court of the United States for the eastern district of Missouri. In bankruptcy.

IN THE MATTER OF JAMES J. O'FALLON AND Samuel A. Hatch, bankrupts. } No. 949.

47 At S't Louis, in said district, Saturday, 2nd day of December, A. D. 1871.

This day come Archie Woods and William H. Matthews, petitioning creditors herein, by their attorneys, Mess'rs Hendershott & Chandler, and present to the court their petition, heretofore filed herein, praying for the appointment of a receiver of the estate and effects of said bankrupts for the reasons and subject to the terms and conditions in said petition stated.

And the court having considered said petition, and being fully advised in the premises, it is ordered that Leonard Matthews, esquire, of the city and county of S't Louis, in said district, be, and he is hereby, appointed receiver of the estate and effects of the copartnership composed of said James J. O'Fallon and Samuel A. Hatch, and also of the individual estate and effects of said bankrupts respectively.

And the said Matthews having filed a bond herein, with sureties approved by the court, in the sum of ten thousand dollars, he is hereby ordered to take possession of the goods, property, and effects of the said bankrupts, both of the said copartnership and of said O'Fallon and Hatch, individually, and the same hold until the further order of this court.

48 And it is further ordered that, until the further orders of this court herein, the said receiver be authorized to ask, demand, and receive, from any and all persons from whom the same may be due and owing, any and all sum or sums of money and any and all property of what kind soever belonging to said bankrupts, either as members of said copartnership or individually; also to ask for, demand, and receive any and all books, papers, and accounts of any kind whatsoever belonging to said firm or to said individuals, bankrupts, except such assets, books, papers, and accounts as may be in the possession of Samuel L. James, hereinafter mentioned. And he is further authorized to make all disbursements necessary for the interest of said estate, especially for the proper keeping of certain valuable live stock belonging to said bankrupts.

And it is further ordered that the order heretofore made by this court appointing Samuel L. James receiver of the interests of said estate in

the State of Louisiana continue in force, and that he report to and act under the said Matthews, receiver, until the further order of this court.

And it is also ordered that said Matthews keep an account of all
49 moneys by him received and expended in any wise pertaining to the estate in pursuance of this order.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, Joseph H. Clark, clerk of the district court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto annexed to be a true copy of the order made by said court of date 2nd December, A. D. 1871, appointing Leonard Matthews receiver in the matter of James J. O'Fallon and Samuel A. Hatch, bankrupts, in bankruptcy, as fully as the same remains of record in said matter in my office.

I' witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of S't Louis, in said district, this 4th day of April, in the year of our Lord eighteen hundred and seventy-three.

[SEAL.] (Signed) JOSEPH H. CLARK,
Clerk of said Court.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, Samuel Treat, judge of the district court of the United States
50 in and for the eastern district of Missouri, do hereby certify that Joseph H. Clark, whose signature appears to the within certificate, is, and was at the date thereof, the clerk of said court, and that said certificate is in due form.

In witness whereof I hereunto subscribe my name, at the city of S't Louis, in said district, this fourth day of April, in the year of our Lord eighteen hundred and seventy-three.

(Signed) SAMUEL TREAT.

Copy of order allowing receiver to contest proceedings in Louisiana, referred to in statement of facts, marked "F."

In the district court of the United States for the eastern district of Missouri. In bankruptcy.

IN THE MATTER OF JAMES O'FALLON AND Samuel A. Hatch, bankrupts. } No. 949.

Now on this the 2nd day of December, A. D. 1871, comes Leonard Matthews, heretofore appointed by this court receiver of the estate and effects of the copartnership composed of James J. O'Fallon and Samuel A. Hatch, as well as receiver of the individual estate of said
51 James J. O'Fallon and Samuel A. Hatch respectively, and files his petition to be permitted to appear and contest in the district court of the United States for the districts of Louisiana, and in any and all other courts in said State of Louisiana, any and all demands, suits, and applications by said Hatch made or instituted of and concerning the bankruptcy of the said Samuel A. Hatch, or of the copartnership of O'Fallon and Hatch, composed of the said James J. O'Fallon and Samuel A. Hatch, and also that said Matthews, receiver as aforesaid, be per-

mitted to receive any and all of the effects of the bankrupt estates of said copartnership, and of the private estates respectively of the said James J. O'Fallon and of the said Samuel A. Hatch, and to all and singular which may or ought to be done to secure possession by suit or otherwise of all the estate and effects, books, and papers to said copartners and their private estates belonging or in any wise appertaining, except such as heretofore Samuel L. James has by order of this court, as provisional receiver, been empowered to take possession of and control under the orders of this court.

And the court, being fully advised of the premises, doth order,
52 adjudge, and decree that said Leonard Matthews, receiver as aforesaid, appear in said district court of the United States for the district of Louisiana and in any and all other courts in said State of Louisiana, and take such action with respect to any demands, suits, or applications therein pending, or hereafter instituted, at the instance of the said Hatch or others, as may be necessary, meet, and proper to enable him, the said Matthews, to defeat any and all attempts to interfere with his rights and duties as receiver aforesaid or to prevent him from obtaining full, undisturbed, and complete possession and control of said copartnership, estate, and effects of O'Fallon & Hatch, and also the private estates and effects of said James J. O'Fallon and Samuel A. Hatch, and to do all and singular the things which may be meet and proper to obtain such possession and control of all of the said estates and effects, books, papers, and documents, and to defeat any interference with his rights and duties as said receiver.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, Joseph H. Clark, clerk of the district court of the United
53 States, in and for the eastern district of Missouri, do hereby certify the writing hereto annexed to be a true copy of the order made by said court allowing receiver to contest proceedings in Louisiana, dated 2nd December, A. D. 1871, in the matter of James J. O'Fallon and Samuel A. Hatch, bankrupts, in bankruptcy, as fully as the same remains of record in said matter in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of S't Louis, in said district, this 4th day of April, in the year of our Lord eighteen hundred and seventy-three.

[SEAL.] (Signed) JOSEPH H. CLARK,
Clerk of said Court.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, Samuel Treat, judge of the district court of the United States in and for the eastern district of Missouri, do hereby certify that Joseph H. Clark, whose signature appears to the within certificate, is, and was at the date thereof, the clerk of said court, and that said certificate is in due form.

In witness whereof I hereunto subscribe my name, at the city of S't Louis, in said district, this fourth day of April, in the year of our Lord eighteen hundred seventy-three.

(Signed) SAMUEL TREAT.

54 *Plaintiff's bill of exceptions.—Filed June , 1874, nunc pro tunc, as of March 3rd, 1874.*

U. S. circuit court, district of Louisiana.

R. K. WOODS, ASSIGNEE OF O'FALLON AND HATCH, *vs.* SAMUEL SMITH & CO. } No. 6889.

Be it remembered that at the trial of this cause the defendants offered in evidence the three notes described in their answer, together with the acts of pledge alluded to in said answer, for the purpose of proving the indebtedness described in said answer, when the plaintiff objected to the introduction of said notes and pledges as evidence of indebtedness of said estate of O'Fallon and Hatch wherein, because said debts had never been proved up in accordance with the requirements of the bankrupt law of the United States, and in this suit cannot be recognize' as debts as against the plaintiff, when the court overruled said objection and admitted the same in evidence; to which ruling the plaintiff excepted and presented this bill of exceptions, and prays that the same may be signed and sealed by the court as of date of the 3rd of March, 1874.

[L. S.] (Signed) E. H. DURELL, *Judge.*

55 *Motion and order making Yeatman & Moore parties plaintiffs.—Entered and filed April 14th, 1875.*

U. S. circuit court, district of Louisiana.

R. K. WOODS, ASSIGNEE OF O'FALLON AND HATCH, *vs.* SAMUEL SMITH & CO. } No. 6889.

SAME *vs.* L. F. GÉNÉRÉS. } No. 6890.

SAME *vs.* NEW ORLEANS SAVINGS INSTITUTION. } No. 6886.

SAME *vs.* D'R W'M N. MERCER. } No. 6887.

SAME *vs.* JOHN A. TURNELL. } No. 6888.

On motion of Given Campbell, attorney for plaintiff in aforesaid causes, and upon suggesting to the court that the plaintiff in said suits, Robert K. Woods, died on the 14th of February, 1874, and that James E. Yeatman and James C. Moore, both of Saint Louis, Missouri, were duly appointed and qualified as his successors in the office of assignees of aforesaid bankrupt estates, as will appear from a duly-
56 certified copy of the deed of assignment to them from the Hon. Samuel Treat, judge of the district court of the United States for

the eastern district of Missouri, which deed is herewith filed as Exhibit A, hereto attached:

Ordered, that said James E. Yeatman and James C. Moore, assignees as aforesaid, be made parties plaintiff herein, instead of said Woods, and that they be authorized to prosecute these suits as plaintiffs.

Deed of assignment.—Filed with motion April 14th, 1875, marked "Exhibit A."

In the district court of the United States for the eastern district of Missouri. In bankruptcy.

IN THE MATTER OF THE COPARTNERSHIP OF O'Fallon and Hatch, and of James J. O'Fallon & Samuel A. Hatch, individually, bankrupts. } No. 949.

The court having, on this the twenty-fourth day of February, A. D. eighteen hundred and seventy-four, made the following order in the above-entitled matter, to wit:

The death of Robert K. Woods, assignee of the copartnership
57 estate of O'Fallon and Hatch, a copartnership heretofore composed of James J. O'Fallon and Samuel A. Hatch, and assignee also of the individual estates of said O'Fallon & Hatch respectively, having been duly suggested to the court by James E. Yeatman, co-assignee of said estates:

It is, on motion of said Yeatman, ordered, that James C. Moore be appointed co-assignee of said Yeatman, and that said Yeatman and Moore be, and they are hereby, appointed, confirmed, and approved as assignees of the estates aforesaid, so far as the same remain undisposed of.

Now, therefore, know all men by these presents that James E. Yeatman and James C. Moore, of the city of S't Louis, in the county of Saint Louis and State of Missouri, have been duly appointed assignee' in said matter.

Now, therefore, I, Samuel Treat, judge of said district court, by virtue of the authority vested in me by the 14th section of an act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2d, 1867, do hereby convey and assign to said James E. Yeatman and James C. Moore,
assignees as aforesaid, so far as the same have been heretofore un-
58 disposed of, all the estate, real and personal, of the said copartnership of O'Fallon & Hatch and of the said James J. O'Fallon and Samuel A. Hatch, bankrupts aforesaid, including all the property of whatever kind of which they were possessed or in which they were interested or entitled to have on the ninth day of September, A. D. 1871, with all their deeds, books, and papers relating thereto, excepting such property as is exempted from the operation of this assignment by the provisions of said section of said act:

To have and to hold all the foregoing premises to the said James E. Yeatman and James C. Moore and their heirs forever. In trust, nevertheless, for the use and purposes, with the powers, and subject to the conditions and limitations, set forth in said act.

In witness whereof I, Samuel Treat, judge of said court, have hereunto set my hand and caused the seal of said court to be affixed this twenty-fourth day of February, A. D. 1874.

(Signed) SAMUEL TREAT.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, Joseph H. Clark, clerk of the district court of the United
59 States in and for the eastern district of Missouri, do hereby certify the writing hereto annexed to be a true copy of the deed of assignment to James E. Yeatman and James C. Moore, in the matter of James J. O'Fallon and Samuel A. Hatch, bankrupts, in bankruptcy, as fully as the same remains on file and of record in said matter in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of S't Louis, in said district, this 9th day of April, in the year of our Lord eighteen hundred and seventy-five.

[SEAL.] (Signed) JOSEPH H. CLARK,
Clerk of said Court.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, Samuel Treat, judge of the district court of the United States in and for the eastern district of Missouri, hereby certify that Joseph H. Clark, whose signature appears to the within certificate, is, and was at the date thereof, the clerk of said court, and that said certificate is in due form.

In witness whereof I hereunto subscribe my name at office in
60 the city of Saint Louis, in said district, this 9th day of April, in the year of our Lord eighteen hundred and seventy-five.

(Signed) SAMUEL TREAT.

Motion and order granting writ of error.—Extract from the minutes, April 15th, 1875.

Circuit court of the United States, fifth circuit and district of Louisiana.
November term, 1874.

NEW ORLEANS, *Thursday, April 15th,* 1875.

Court met pursuant to adjournment.
Present, Hon. W. B. Woods, circuit judge.

R. K. WOODS, ASSIGNEE, &C., JA'S E. YEATMAN & JA'S C. MOORE, assignees of O'Fallon & Hatch, substituted,
vs.
SAMUEL SMITH & CO. } No. 6689.

On motion of Given Campbell, attorney for plaintiffs in this cause, and upon suggesting to the court that the said plaintiffs feel aggrieved by the final judgment rendered in said cause against them on the 3rd day of March, 1873, and signed on the seventh day of March, 1873, and that they believe there is error to their prejudice in said judgment rendered as aforesaid, and that they desire a writ of error from
61 said judgment, returnable in the Supreme Court of the United States on the second Monday of October next: It is ordered that the said plaintiff in said cause be allowed a writ of error as prayed for, on giving bond for the sum of five hundred dollars for costs, with good and solvent security.

Bond for writ of error.—Filed April 15th, 1875.

JA'S E. YEATMAN & JA'S C. MOORE, ASSIGNEES of O'Fallon & Hatch, plaintiffs in error,
vs.
SAMUEL SMITH & CO., DEFENDANTS IN ERROR.
No. 6889.

Know all men by these presents that we, James E. Yeatman and James C. Moore, assignees of O'Fallon & Hatch, and the individual members thereof, James J. O'Fallon & Samuel A. Hatch, bankrupts, as principals, and Archie Woods, as surety, are held and firmly bound unto Samuel Smith & Company, and F. A. Woolfley, clerk of the circuit court of the United States for the fifth judicial circuit and district of Louisiana, in the full and just sum of five hundred dollars, to be paid to the said Samuel Smith & Co., and F. A. Woolfley, clerk of said court,
62 their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this fifteenth day of April, in the year of our Lord one thousand eight hundred and seventy-five.

Whereas lately, at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the district of Louisiana, in a suit depending in said circuit court wherein James E. Yeatman and James C. Moore, assignees of O'Fallon and Hatch, are plaintiffs, and Samuel Smith & Co., defendants, judgment was rendered against the said plaintiffs; and the said plaintiffs having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Samuel Smith & Co., admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said James E. Yeatman and James C. Moore, assignees of O'Fallon and Hatch, shall prosecute their writ to effect, and answer all damages and
63 costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) JAMES E. YEATMAN, [L. S.]
" JAMES C. MOORE, [L. S.]
Assignees of O'Fallon and Hatch.
(Signed) ARCHIE WOODS. [L. S.]

Sealed and delivered in the presence of—
(Sign'd) F. B. VINOT.

Approved.
(Signed) W. B. WOODS, *Judge.*

Assignment of errors.—Filed April 16th, 1875.

United States circuit court, district of Louisiana.

R. K. WOODS, ASSIGNEE, &C., JAMES E. YEATMAN & JAMES C. MOORE, assignees, &c., substituted,
vs.
SAMUEL SMITH & CO.
No. 6889.

Now comes James E. Yeatman and James C. Moore, assignees of O'Fallon and Hatch, in bankruptcy, made plaintiffs herein, and say

there is manifest error in the judgment of the court in said cause, and they assign as errors in said judgment—

1. That upon the pleadings and facts, as stated in the finding by the judge of the circuit court, and the law in such cases made and
64 provided, there ought to have been a judgment for the plaintiffs for the amount claimed in the petition.

2d. There was error in the admission by the court as evidence of the notes and acts of pledge, stated in the bill of exceptions taken by the plaintiffs at the trial and made part of the record herein.

3rd. Because the court erred in recognizing the defendants as creditors of said estate of O'Fallon & Hatch, when they failed and refused to prove up their debts in bankruptcy.

4th. Because upon the facts found, the property sued for ought to have been delivered upon the order of the district judge of Missouri to the officer designated by said court; and the court erred in holding that the refusal to deliver the property sued for was not a conversion of it by defendants.

5th. The court erred in admitting the defendants as creditors until they had proved their debts in the proper district and been allowed as creditors of said estate.

(Signed) GIVEN CAMPBELL,
Attorney for Plaintiffs.

65 UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and district of Louisiana.

CLERK'S OFFICE.

I, Francis A. Woolfley, clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, do hereby certify that the foregoing 64 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had on the trial of the case of Robert K. Woods, assignee, &c., James E. Yeatman, and James C. Moore, assignees of O'Fallon and Hatch, bankrupts, versus Samuel Smith & Co., No. 6889 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 10th day of August, A. D. 1875.

[SEAL.] F. A. WOOLFLEY, *Clerk.*

I, W. B. Woods, United States judge for the district of Louisiana, do certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, was at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand at the city of New Orleans, in said district, this 10th day of August, A. D. 1875.

W. B. WOODS, *Judge.*

66 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit, and holding sessions for the district of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said circuit court before you, or some

of you, between James E. Yeatman and James C. Moore, assignees of O'Fallon & Hatch and the individual members thereof composing said firm, to wit, James J. O'Fallon and Samuel A. Hatch, bankrupts, plaintiffs, and Samuel Smith & Co., defendants, a manifest error hath happened, to the great damage of the said James E. Yeatman and James C. Moore, assignees of O'Fallon & Hatch, and the individual members of said firm, bankrupts, as by their complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court of the United States, this 15th day of April, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.] F. A. WOOLFLEY,
Clerk of the United States Circuit Court for the District of Louisiana.

(Indorsed:) United States circuit court. No. 6889. Ja's E. Yeatman & James C. Moore, assignees of O'Fallon & Hatch pl'ffs in error, versus Samuel Smith & Co., defendants in error. Writ of error. Filed April 15, 1875. F. B. Vinot, d'y cl'k.

67 THE UNITED STATES OF AMERICA:

Circuit court of the United States, district of Louisiana.

The President of the United States to the commercial firm of Samuel Smith and Company, composed of Samuel Smith, Andrew W. Smith, and Charles Kilshaw, members thereof, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein James E. Yeatman and James C. Moore, assignees of O'Fallon and Hatch, and the individual members thereof composing said firm, to wit, James J. O'Fallon and Samuel A. Hatch, bankrupts, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this 16th day of April, in the year of our Lord one thousand eight hundred and seventy-five.

W. B. WOODS, *Judge.*

68 (Indorsed:) United States circuit court. No. 6889. James E. Yeatman & Ja's C. Moore, assignees of O'Fallon & Hatch, pl'ffs in error, vs. Sam'l Smith & Co., defendants in error. Citation.

Marshal's return.

Received Apr. 16, 1875, by the U. S. marshal, and on the 17th day of the same month and year served a copy hereof on Samuel Smith & Co., defendants in error, by handing the same to Charles Kilshaw, one of the members of the firm of Sam'l Smith & Co., in person.

S. W. REED,
D'y U. S. Marshal.

S. W. Reed, sworn, says: I am a deputy U. S. marshal, and made service of the within citation as stated in my return hereon.

S. W. REED,
D'y U. S. Marshal.

Sworn to & subscribed before me this 11th day of May, 1875.

F. B. VINOT,
U. S. Comm'r.

(Indorsement on cover:) No. 192. James E. Yeatman & James C. Moore, assignees in bankruptcy of James J. O'Fallon & Samuel A. Hatch, composing the firm of O'Fallon & Hatch, plaintiffs in error, vs. Samuel Smith, Andrew W. Smith, and Charles Kilshaw, composing the commercial firm of Samuel Smith & Company. Louisiana C. C. U. S. Filed 12th October, 1875.

Supreme Court of the United States,

March Term, 1877.—No. 192.

JAMES E. YEATMAN & JAMES C. MOORE, Assignees in Bankruptcy of O'Fallon & Hatch,

vs.

SAMUEL SMITH & CO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF LOUISIANA.

GIVEN CAMPBELL,

Attorney for Appellants.

ST. LOUIS:
C. R. BARNS, BOOK AND JOB PRINTER, 215 PINE STREET.
1877.

Supreme Court of the United States.

October Term, 1877.—No. 192.

JAMES E. YEATMAN & JAMES C. MOORE, Assignees in Bankruptcy of O'Fallon & Hatch.
vs.
SAMUEL SMITH & CO.

Appeal from the Circuit Court of the United States, District of Louisiana.

THE PLEADINGS STATED.

On the 18th of January, 1873, Robert K. Woods, Assignee in bankruptcy of James J. O'Fallon and Samuel A. Hatch, and of the firm of O'Fallon & Hatch, bankrupts under a decree of the District Court of the United States for the Eastern District of Missouri, filed his petition in the Circuit Court for the District of Louisiana, for the recovery of $58,311, the value of $46,063.20, Louisiana State Warrants, and $31,685.35, certificates of indebtedness of said State, which were at the date of the adjudication in bankruptcy, the property of the bankrupts, and passed by assignment to him; that at the time they were in possession of the defendant, who had no title to them; that possession had been demanded from defendants on several occasions by a receiver appointed by the Missouri Court, and by plaintiff, and possession was refused; and defendants unlawfully converted them, to the damage of plaintiff in the sum of $58,311, their value at the date of conversion, with prayer for judgment and *general relief.*

To this defendants filed an answer, admitting the possession of the warrants and certificates of indebtedness described in the petition of plaintiff, but alleging that they held them as security under pledges, as follows. That they held $25,000 warrants under an act of pledge from O'Fallon & Hatch dated April 24th, 1871, to secure the payment of a note of O'Fallon & Hatch of even date with the pledge for $12,500; due on 9th January, 1872; that they held Louisiana State warrants for $31,685.35, under an act of pledge of same parties, dated May 12th, 1871, to secure the payment of a note of O'Fallon & Hatch, dated May 12th, 1871, due January 12th, 1872; that they held $21,063.20 Louisiana State warrants under an act of pledge from O'Fallon & Hatch, dated May 10th, 1871, to secure the payment of a note of O'Fallon & Hatch of even date for $26,719.25, due on demand; that in January, 1871, O'Fallon & Hatch were indebted to them in a large sum, of which the $26,719.25 formed a part; that O'Fallon & Hatch had in the hands of L. F. Génerés of New Orleans, certain securities of the State of Louisiana amounting to $96,006.07 on which O'Fallon & Hatch had obtained loans; that O'Fallon & Hatch pledged said securities, subject to the prior loans upon them, as additional security for said indebtedness due January, 1871, and gave defendants an order on Génerés to hold said securities then in his hands subject to the demand of defendants aforesaid upon the payment of the prior loans thereon; that Génerés was notified of this, and promised compliance; that the five warrants for $25,000 and the $31,685.35 warrants aforesaid formed part of such securities in the hands of Génerés; that on the execution of the note for $26,719.25 all the rights of defendants under this pledge of January, 1871, were maintained, and that when the defendants obtained these warrants to secure the loans for $12,500 and $15,800 aforesaid, they were also subject to the said pledge to secure the demand note for $26,719.25, and defendants asked for judgment. Subsequently, on the 18th of February, 1873, defendants filed an amended answer, in substance averring that they were willing to surrender the securities upon payment of these debts, and alleging that at the time the suit was instituted the warrants at seventy-five cents on the dollar were not sufficient to pay the debts due defendants with accrued interest, and asked for judgment.

The facts are stated in the finding of the court, and are briefly as follows: On 2d January, 1871, O'Fallon & Hatch executed their demand note in favor of defendants for $111,166.27, and as security executed a pledge upon $96,006.07, *certificates of indebtedness* of the State of Louisiana, which had been placed by O'Fallon & Hatch a short time before for the purpose of pledging them as security for loans to be made to O'Fallon & Hatch, and at that time they had already been pledged to secure loans made by other parties to the extent of 50 cents on the dollar of their face value. Generes had authority from O'Fallon & Hatch to pledge them anew as the debts matured when it became necessary to renew the loans. On the same day with this pledge to defendants, O'Fallon & Hatch gave a written order on Generes to hold the securities subject to the order of defendants, which Generes promised to do. Subsequent to this, Generes liberated the $25,000 and the $31,685.35 warrants from the previous pledges, by obtaining the loans from defendants of the $12,500 and the $15,800, when he delivered them to defendants as security for these loans under the pledges referred to in the answer of defendants. That on the 10th of May, 1871, the indebtedness of O'Fallon & Hatch of $111,166.27 was reduced to $26,719.25, for which sum O'Fallon & Hatch made their note that day payable on demand and delivered it to defendants, and executed a pledge of same date to defendants upon warrants to the amount of $21,063.20 "and certificates of indebtedness held by L. Generes, $96,006.07." When this note was made, the note for $111,166.27 was delivered to O'Fallon & Hatch. This pledge is by mistake left out of the printed record. See Record p. 12, where the Judge in his finding says that the pledge is filed with defendants' answer and "made part of this statement." The pledge is as follows:

[Pledge No. 3]

Know all men by these presents, that whereas, Sam'l Smith & Co. have this day discounted our note for the sum of twenty-six thousand seven hundred and nineteen dollars and twenty-five cents, drawn to the order of Sam'l Smith & Co., dated May 10, 1871, and made payable on demand with interest at 8 per cent. per annum from date, and commission for advancing at the rate of 10 per cent. per annum.

Now, in order to secure the payment of said note at maturity, we do, by these presents, pledge, pawn and deliver unto said Samuel Smith & Co., twenty-one thousand and sixty-three dollars and twenty cents in warrants of the State of Louisiana, viz.:

No. 1167 to James Bynum et al., per O'Fallon & Hatch $5,000.00
No. 1168 do - - - - - - - 5,000.00
No. 1169 do - - - - - - - 5,000.00
No. 1172 do - - - - - - - 5,000.00
No. 3525 Hatch, James & Co., per Sam'l Smith & Co., 1,063.20
And certificates of indebtedness held by L. F. Génerés - - - - - - 96,006.00

And we do hereby consent and agree that in case our said note shall not be punctually paid at maturity, the said Sam'l Smith & Co. shall have the right to sell and transfer the warrants so pledged, for cash, at public or private sale, at the option of said Sam'l Smith & Co., without the intervention of courts of justice, and without appraisement, and the proceeds of said sale shall be appropriated to the payment ot our said note, and all costs aad changes attending the sale.

Witness our hand, at New Orleans, this 10th day of May, A. D. 1871, in presence of C. C. Lewis.

O'FALLON & HATCH."

Under this condition of affairs, defendants, under inducement of Génerés, discharged the previous loans on the $25,000 and the $31,685.35 of warrants and then received them from Génerés as agent of O'Fallon & Hatch under the pledges referred to in the statement of the court as "made part of this statement", Record p. 13—but which are by mistake omitted from the printed record, and which are as follows:

[Pledge No. 1.]

New Orleans, 24th day of April, 1871.

Whereas,.....ha discounted a certain promissory note, for the sum of twelve thousand five hundred dollars, made by O'Fallon & Hatch, to the order of themselves, dated on the twenty-fourth day of April, 1871, payable nine months after date thereof, with 8 per cent. interest from maturity, till paid.

Now, in order to secure the full and punctual payment of said

promissory note at maturity, or of any renewal thereof, together with all interest that may accrue thereon, the undersigned, O'Fallon & Hatch, de hereby pledge to said.....the property following, to-wit :

Five Louisiana State warrants, Nos. 1596, 1597, 1598, 1599, 1600, for the sum of five thousand dollars each.....$25,000

And it is hereby agreed that, in the event of the non-payment of said note at its maturity, or of any renewal thereof; the said..... .....hereby constituted and appointed agent of the undersigned, and authorized, jointly or separately, and without recourse to any legal proceedings whatever, to cause said pledged property, of whatever nature it is, to be disposed of for cash at public or private sale, at option, and to apply and appropriate the proceeds of said sale to the payment of the aforesaid note, with all interest accrued thereon and all commissions, damages, costs and charges attending said sale.

In order further to carry out in good faith the intention of this contract, we, O'Fallon & Hatch, do hereby make, constitute, and appoint the said.....our true and lawful attorney or attorneys for us, and in our name, to sell, transfer, and assign, all the stock or stocks, scrip or scrips, here pledged and hypothecated as above, standing in our name on the books of said corporations or companies; hereby ratifying and confirming all that our said attorney or attorneys or his or their substitute or substitutes shall do therein by virtue of these presents

In witness whereof, we have hereunto set our hand and seal, the date above written, in presence of witness, Chas. A. Maurian.

O'FALLON & HATCH.

The undersigned.....hereby accept said pledge, and acknowledge to have received the said property pledged, which has been delivered to him by the pledgor.

[Pledge No. 2.]

New Orleans, 12th day of May, 1871.

Whereas, ... ha discounted a certain promissory note for the sum of fifteen thousand eight hundred dollars made by O'Fallon & Hatch, to the order of themselves, dated

on the twelfth day of May, 1871, payable eight months after date thereof, with eight per cent. interest, from maturity until paid.

Now, in order to secure the full and punctual payment of said promissory note at maturity, or of any renewal thereof, together with all interest that may accrue thereon, the undersigned, O'Fallon & Hatch, do hereby pledge to said.....the property following, to wit :

One certificate of indebtedness of the State of Louisiana, No. 121, dated June 4th, 1870, issued to Messrs. S. L. James, Tom Bynum, J. J. O'Fallon and S. A. Hatch, assignees, for the sum of thirty one thousand, six hundred and eighty-five dollars and thirty-five cents, which certificate has been exchanged for warrants under date of the 3d of April, 1871..... .....$31,685.35

And it is hereby agreed that, in the event of the non-payment of said note at its maturity, or of any renewel thereof, the said ..... hereby constituted and appointed agent of the undersigned, and authorized, jointly or separately, and without recourse to any legal proceedings whatever, to cause said pledged property, of whatever nature it is, to be disposed of for cash, at public or private sale, at option, and to apply and appropriate the proceeds of said sale to the payment of the aforesaid note, with all interest accrued thereon, and all commissions, damages, costs and charges attending said sale.

In order further to carry out in good faith the intention of this contract, we, O'Fallon & Hatch do hereby make, constitute and appoint the said..... our true and lawful attorney or attorneys for us and in our name, to sell, transfer, and assign, all the stock or stocks, scrip or scrips, here pledged and hypothecated as above, standing in our name on the books of said corporations or companies ; hereby ratifying and confirming all that our said attorney or attorneys, or his or their substitute or substitutes, shall do therein, by virtue of these presents.

In witness whereof we have hereunto set our hand and seal, the date above written, in presence of witness, Chas. A. Maurian.

O'Fallon & Hatch,
pp. J. E. Kelso.

The undersigned..... ....hereby accept said pledge, and acknowledged to have received the said property pledged, which has been delivered to him by the pledgor.

Which pledges were given to secure the notes described in the answer of the defendant. Defendants charged O'Fallon & Hatch, by agreement, interest at the rate of 18 per cent. as a consideration for extending payment of the demand note of $111,166.27, and the debt reduced by payments from time to time when the 18 per cent. interest was each time added to the principals and 18 per cent. charged on the "blended amounts" until on February 16, 1871, a balance was struck and acquiesced in by O'Fallon & Hatch, of $25,654.57. On 10th of May, 1871, the defendants rendered another account in which they charged interest on the balance of $25,654.57 at the rate of 18 per cent. from 16th February, 1871, which added to the $25,654.57 made $26,719.25, for which the note of O'Fallon & Hatch was given, secured by the pledge as aforesaid. The court also finds a mercantile custom, adding interest to principal upon rendition of accounts and charging interest on the balance thus obtained, and that these accounts are thus continued until closed by payment "or by the *debtor giving a promissory note*", that all the notes are unpaid the finding shows the adjudication in bankruptcy, and the appointment of Loenard Matthews as receiver, that his appointment was *ex parte* without notice to the defendants, that he received orders from the United States District Court in Missouri to go to New Orleans and sell such warrants as are stated in the order of the Missouri Court, that he came to New Orleans at different times between Dec. 10th, 1871, and Feb. 27th, 1872, and demanded the delivery of the warrants from defendants to be sold, that defendants refused to give them up, offering to give them up if their notes were paid, but refusing to prove their debts in bankruptcy when requested. Then on 27th Feb'y, 1872, the District Court in Missouri, by an *ex parte* order, authorized and empowered the said receiver to sell these collaterals at a price not less than 72 per cent. for warrants, and to hold the proceeds subject to the order of the Court in Missouri, reserving all liens against proceeds upon proof of debt in bankruptcy; that defendants were notified of this order and demand was made on them for the warrants and they refused to prove their debts or surrender the collaterals unless their notes were previously paid. At that time the warrants were worth 72 cents on the New Orleans market and they continued to rise in value till April, 1872, when they were worth 75 per cent., and then declined, and on June 17,

1872, were only worth 62 per cent. Defendants, prior to the suit, sold some of the warrants as high as 79 cents on the dollar. At date of suit defendant held all the warrants except about $32,000 which they had sold; that on 20th May, 1873, Robert K. Woods was appointed assignee, and by an *ex parte* order he was ordered and authorized to go to New Orleans and sell the collaterals in question; the said assigneewent to New Orleans upon this mission and on 17 June, 1873, demanded of defendants the delivery of these warrants for sale, telling them to prove their debts and then he would be in a position to settle with them; defendants refused to prove their debts or to surrender the collaterals, unless their debts were first paid by the assignee, and they were willing to a sale upon these conditions. Defendants were convinced that the warrants ought to have been sold in February and March, 1872. Defendants had sold, at date of suit, a large amount of the collaterals, but it does not appear how much, nor how much they then held from the finding of the court. At the trial of the case the defendants offered all the notes in evidence which were admitted contrary to the objection of plaintiff's counsel, and a bill of exceptions was taken. Subsequently to the trial Robert K. Woods died and the present plaintiffs were made parties plaintiffs.

The only controversy is upon the law of the case.

The Assignment of Errors and Grounds upon which a Reversal of the Decree Should be had, and a Decree in Favor of Plaintiffs Rendered in this Court.

1. That upon the pleadings and finding of facts by the court, and the law judgment ought to have been rendered for plaintiff in said cause.

2. The court erred in admitting the notes of O'Fallon & Hatch in evidence as debts against the plaintiff as assignee of the estate of O'Fallon & Hatch, in opposition to the objection of the plaintiff's attorney.

3. The court erred in holding that a custom of merchants in Louisiana to compound usurious interest and commissions in an account was a lawful custom and binding upon plaintiff in this suit.

4. The court erred in admitting the note offered by defendants,

in evidence, for $26,719.25 as a lawful debt in due course of trade when the finding shows it to have been largely made up of usurious interests and commmissions added and compounded on each other.

POINTS OF LAW AND CITATION OF AUTHORITIES.

FIRST. *The filing of the petition in bankruptcy at once brings the property of the insolvent into the bankruptcy court, and places it in its custody and under its protection as fully as if actually brought into the visible presence of the Court.*

This proposition was affirmed under the act of 1841—see Houston vs. City Bank of New Orleans, 6 Howard 486. Norton's Assignees vs. Boyd, 3 Howard 426,—and such is the doctrine of the court of the country under the present law.

See *In re* Sacchi 6. National Bankrupt Reporter, p. 498.
In re Davis vs. Anderson, 6 N. B. R. 150.
In re Brinkman, 7 N. B. R. 425.

Again, the leading object of the law is the speedy and equal distribution of the bankrupt estate among his creditors.

See Avery vs. Hackley, 20 Wallace 413.
Baily vs. Glover, 21 Wallace 346.

From this it follows that in order to effectually make such distribution, the court in charge should know who the creditors are. At the time of the trial of this cause in the court *a quo*, the current of authority was in favor of the doctrine that secured creditors must prove their debts in the forum of the Bankruptcy. While this has been questioned, I believe that this court has never directly decided this question. At the trial, objection was made to the consideration by the court of the note and pledge offered by the defendant, which objection was overruled and the point saved in a bill of exceptions.

It has been frequently decided that secured creditors should prove their debts.

See *In re* Bridgeman, 1 N. B. R. 312.
In re Henry C. Bolton, do. 370.
In re Biglow & Kellogg, do. 632.

In re Taylor R. Stewart, do, 278.
In re Ruehle, do. 557.
In re Snedaker, 3 do. 629.
Davis vs. Anderson, 6 do. 579.
In re Grinnell 9 do. 29.
In re Thomas Morrison 10 do. 105.
See also North Carolina Rep., Blum., Ex'r vs. Ellis.

Such would seem to be the fair deductions from the act itself.
See R. S. 5075, 5076; 5077.

If this were not required, a dishonest debtor could securely conceal all his property under cover of fraudulent pledges, and utterly defeat the object of the law. The point made in the court below was that this defendant had been requested to prove up its debt as a secured creditor and had refused, and hence should not be recognized as a creditor in this action. It may be, however, said that under present decisions this point is not much relied upon in this court, though not abandoned.

Again it is believed that the bankruptcy of O'Fallon & Hatch changed the relation of the parties and raised up new duties on the part of those dealing with the assets of the bankrupt estate. The *fiat* in bankruptcy *fixed* the condition of the parties, and thereafter the property of the bankrupts of every character was in *custodea legis*, and its *managemeut* in the hands of the court in bankruptcy, whose duty was to take immediate steps to protect and save the assets in furtherance of the ends of the law, i. e. the speedy and equal distribution among the creditors.

See R. S. § 5,065, Young vs. Bank of Bengal, L. R. 3 C. P. 444.
Astley vs. Guerney L. R. 4 C. P. 714.

The record shows that the learned judge of the District Court for the Eastern District of Missouri, aware that certain persons in New Orleans, of whom defendant was one, held assets of the estate under a claim of pledge, and that these assets were of a fluctuating character, took prompt steps to save them for the creditors; that he appointed an agent of the court, Leonard Matthews, to receive and sell these assets, reserving at the same time all rights which might be claimed against them, under the pledge, upon distribution; that

defendants were notified of the action and wish of the court; that the time to sell had come, and that the court did not desire to hold such speculative assets: that the defendants themselves thought that the time to sell was in February and March; that a ready sale could be made in the New Orleans market whereby a margin could have been made over even the full face of the notes held by the defendants, all of whose notes were due; that there was a large margin over the debts for $12,500; secured by $25,000 warrants and the debt for $15,800 secured by $31,685.35 warrants at the price of 72 per cent. is shown; thus the aggregate of the two notes is $28,300. The aggregate value of the $56,685.35 warrants at 72 per cent. is $40,813.20, leaving a margin of $12,513.20; but the defendants endeavor to reach this margin by means of the pledge to secure the note for $26,719.25 dated May 10, 1871, set out in this brief, p. —. But plaintiffs deny in the first place that this is under the facts found by the court a proper claim against the estate of O'Fallon & Hatch, because, *first, the Record shows it to be composed of usurious charges and illegal commissions.*

Account "D" in the finding of the court, record p. 18, shows the balance of the account between O'Fallon and Hatch to be $111,166.27, one of the items composing which is $9,070.85, "to settle commission and interest," which, under the finding of the court, was at the rate of 18 per cent. per annum. Account "E" of the defendants, record p. 18, shows that on this amount they charged interest and commission at the rate of 18 per cent. for forty-one days, equal to $2,277.88; that this was added to the previous charge of $111,166.27, making $113,444.15. And from this amount a credit is taken of $87,600, leaving $25,844.15. Interest and commission is charged on this amount for five days, at 18 per cent., making $64.62, which is added, and on the balance, interest and commission at the rate of 18 per cent. to May 10, 1871, amounting to $1,064.68, is added to make up the note for $26,719.25, and on that day the note was drawn and the pledge given containing the words, "and certificates of indebtedness held by L. F. Generes, $96,006.07." This note was admitted by the court as a just debt for its full amount, based upon the custom of merchants; but the plaintiffs submit that it should not have been allowed in evidence. The law of Louisiana is well settled as to transactions of this character, and the interest in such case is for-

feited. In the digest of the Louisiana statutes, 1870, § 1887, it is provided that bankers and banking companies shall be entitled to charge and receive discounts at a rate not greater than the maximum allowed by law on conventional obligations, and that other contracts shall be regulated by the laws in regard to interest upon contracts between individuals.

The code article 2,894 provides that "the amount of conventional interest cannot exceed 8 per cent.; the same must be fixed in writing; *testimonial* proof of it is not admitted in any case."

In the finding of the court no contract in writing to pay 18 per cent. interest on this account "D," or on the subsequent balance can be found, and this court can presume none. Then the interest must be held usurious and is forfeited under the law.

See Tarver vs. Winn, 18 Louisiana Annual Rep., p. 558.
See Walker vs. Villevaso, 18 Louisiana Annual Rep., p. 714.
See also Haven vs. Hudson, 12 La. Annual, p. 660, and Lalande vs. Breaux, 5 La. Annual, p. 505.

In which it was held that 2½ per cent. commissions added to 8 per cent. interest was usurious.

See Kean vs. Brandon, 12 La. Annual, p. 23, where the court held that, "Conventional interest cannot be charged without an agreement in writing to authorize it, and by no evasion in the form of his contract can the creditor lawfully obtain more than 8 per cent. for the use of his money."

An acquiescence by the debtor of the creditors account charging usurious interest does not estop the party acquiescing from his action for a recovery, even after it has been paid, (but in this case it has not been paid).

See Crane vs. Beatty, 15 La. Annual, p. 329.
Wright vs. Hill, 13 La. Annual, p. 235.

The custom of merchants cannot change the law.

Lea vs. Goodrich, 21 La. Annual, p. 278.
See Haven vs. Hudson, 12 La. Annual, p. 660.
Gilley vs. Burtin, 12 La. Annual, p. 723.
Lallande vs. Breaux, 5 La. Annual, p. 505.

The counsel for appellees will no doubt rely on the acts of the Louisiana Legislature of 1856 and 1860, but it is plain that this kind of a transaction is not within the meaning of these acts. They were intended to favor commerce and the negotiation of commercial paper and did not apply to interest charged on existing debts for an extension of time.

See Crane vs. Beattie, 15 La. Annual, p. 329.
Johnson vs. Robbins, 20 La. Annual, p. 569.
Weaver vs. Kearny, 17 La. Annual, p. 327.

The law in this country generally allows usurious interest to be recovered back by the debtor, whether paid under the name of "interest" or "discount." See Bank of the United States vs. Owens, 2 Peters, 527. Tiffany vs. Boatmen's Institution, 18 Wallace p. 388. In the note in question not only is the interest charged usurions, but this is compounded, which is forbidden by the code, article 1934. See also Kean vs. Brandon, 12 La. Annual, p. 22. See Lea vs. Goodrich, 21 La. Annual, p. 278.

If proper imputation is made of the payments made on the accounts set out in the record, there would be very little of this note for $26,719.35 left. "The payments under the law of Louisiana should be imputed first to such portion of the charges as the debtor is lawfully bound to pay; not to such as he was under no obligation to pay; as, for instance, usurious interest." See Kean vs. Branden, 12 La. Annual, p. 21. Thomas vs. D'Armond, 13 La. Annual, 295.

Under the law of Louisiana, and the finding of the court, it would seem that all this usurious interest should be forfeited, which would make a deduction from this note for $26,719 25 of about $12,500, leaving a balance due on the note of $14,219.25, secured by pledges of $21,063.20 in warrants at 72 per cent., worth $15,-165.36, leaving out the claim upon the certificates in the hands of Generes for $96,006.07.

If the court should not take this view of the case, then we contend that the surplus on the pledges to secure the notes for $12,500 and $15,800, is not subject to any deficiency on the note of $26,-719.25, because Sam'l Smith & Co. never held a valid pledge upon the warrants specially pledged to secure these two notes, other than the pledges specially given to secure the notes of $12,500 and $15,800.

The finding of the court does not show facts to justify the conclusion that they held the surplus in these two pledges under the pledge to secure the note for $26,719.25.

If the court should not take this view of the case this pledge, so far as this surplus is concerned, was invalid and void.

The pledge dated January 2, 1871, to secure the note for $111,166.27, so far as it related to the "certificates of indebtedness of the State of Louisiana, deposited in the hands of L. F. Génerés, amounting to $96,006.07," was inoperative, because there was no sufficient description of the things pledged to identify them, and because there was no delivery of the things pledged required by the code, as hereinafter shown, and because the pledge was not registered as required by the code of Louisiana—article 3125.

The finding of the court shows that, at the time this act of pledge was delivered, Génerés had already pledged to other parties these same certificates, to secure loans made by other parties. Now, if these certificates were in his hands at that time they were held by him, as mandatary for the pledgees, who had loaned money on them, and he could not be considered in any sense as holding them for O'Fallon & Hatch. Generes, as to these certificates, was agent, not for O'Fallon & Hatch, but his clients, who held them through him as pledgees, and at that time it did not follow there would be a surplus, and this fact could not be known until the securities were sold to meet the debt; so the letter to him in the record was not sufficient to constitute a delivery in Louisiana. Nothing is presumed in favor of a pledge which is *stricti juris*. See Sewall vs. McNiel, 17 Louisiana, p. 189,—where Judge Bullard said: "We think that the articles of the code which relate to the contract of pledge, by which a debtor seeks to secure a debt, perhaps to the prejudice of other creditors, ought to receive a strict construction."

Again, the facts as found show that the note for $111,166.27 was delivered up to O'Fallon & Hatch when the note for $26,719.25 was made. Record, p. 12. Of course the pledge fell with the note. When the last note was made there was an attempt to retain this pledge upon the same certificates to secure it; but the court will see that the language used in this pledge of 10th of May, 1871, "And certificates of indebtedness held by L. F Génerés, $96,006.07." is subject to the same objection of uncertainty in the

description, and is invalid for the want of delivery of the things pledged. The order on Génerés marked "B," record p. 17, was a part of the attempted pledge of January 2d, 1871. and fell with that pledge upon the surrender of the note for $111,166.27, and cannot by construction be made to apply to the pledge of the 10th of May, 1871. The finding of the court shows that these "certificates held by L F. Génerés" were really not certificates at that time, but warrants, and that they were held under pledges to secure loans to others, as A. Smith & Co , made the loans of $12,500 and $15,800, on the 12th of May, 1871, and received a special pledge of warrants for each note, hence, at the date of the pledge, there could not have been a delivery of *certificates* if any had been thus pledged, and Génerés was not such a third person as is contemplated by article 3129 of the code. The law of Louisiana as to pledges is strictly construed ; see 17 Louisiana, p. 189, cited *ante.*

Delivery is of the essence of a pledge, and without such delivery there can be no pledge. "In all cases of pledge the pledgee must be put in possession of the thing pledged, and if it be a claim, the evidence of the obligation must be transferred and delivered." See Lallande vs. Ingram, 19 Louisiana Annual, p. 368. Foltier vs. Schoder & Schreiber, do, p. 20. Civil code, articles 3100, 3119, 3120, 3122, 3123, 3125, 3129, acts of 1855, No. 287.

The pledge should be of a thing certain—civil code 3100.

Held in Winchester vs. Orys Syndic, 17 Louisiana, rep. p. 429, that a pledge of a note on file in the clerk's office of the court was not such a delivery as the law required under article 3120 of the code. In Caffin vs. Kirwan, 7 Louisiana Annual, p. 221, where a lease was desired to be pledged, held by the court "that the bare agreement of the parties is not equivalent in any case to a fictitious or symbolical delivery within the meaning of article 3120 of the code.

In Martin vs. Casey, 15 Louisiana Annual, p. 165, held in order to create a pledge it is necessary not only that delivery should accompany the private deed, but that the instrument must show the nature and rights of the contracting parties.

Smith & Co., under the Louisiana law, if the pledge of 10th May "on certificates held by L. F. Generes" was invalid, had no right to hold the surplus on the pledges to secure the notes for

$15,800 and $12,500 as security for any deficit on the note for $26,-719.25. See case of Syndics of Yard & Blois vs. Mechanics Bank, 8 La. Rep. 482. In this case the syndics sued the bank for the recovery of certificates of stock pledged by the insolvents to the bank to secure a debt named in the pledge which they alleged had been paid. The bank replied that the pledge was to secure not only the note named, but "for the payment of any other note or obligation which may be now due or become due from us to said bank" the court held that "plaintiffs represented all the creditors of Yard & Blois, and as relates to them we are of opinion the pledge is not valid, beyond the amount of the note specially mentioned in the act according to articles 3124 and 3125 of the code".

Now, when this suit was tried the court found that defendants had already disposed of $32,000 of the warrants pledged, and realized 72 cents on the dollar, amounting to $23,040; the aggregate of the two notes $12,500 and $15,800 is $28,300; deducting from these notes the $23,040, leaves only $5,260 due on these notes, for which there remained as security at the time the suit was brought $24,685.35 warrants which at 72 cents on the dollar were worth $17,773.20, leaving a margin of $12,513.20 to which under all circumstances it would seem the plaintiff was entitled to recover.

THIRD. *The law imposed a plain duty upon the defendant as pledgee to sell the collaterals and save the margin for the estate.*

1. What were the relations between the parties?

The certificates, although encumbered, were a portion of the estate, and the court certainly had the management of the property so far as the surplus was concerned. The defendant had due notice of this, and the relation he bore to the court, representing the dual interest of the bankrupt and the unsecured creditors, was that of a sort of mandatary. The Louisiana code provides that whoever undertakes the business of another, though gratuitously, is responsible for any neglect of duty, A. A. 2,971, 2,972.

By article 2,995 every person is responsible for the damage he occasions, not merely by his act, but by his negligence, his imprudence or his want of skill.

Article 2,294 prescribes that "Every act whatever of man, that causes damage to another, obliges him, by whose fault it happened, to repair it."

Under articles 3,132 and 3,135 of the code the pledgee was forbidden to appropriate the pledge to himself.

With these provisions it would seem that if bankruptcy had not intervened, and defendant had been asked at maturity of the debt to sell the collaterials, when a margin could be made by sale, and the defendants refused, they would be liable for the damage.

And it would seem that the principle should apply with greater force in favor of the plaintiffs in this case. The defendants had express notice of the desire of the court in custody of the estate, that a sale should be made at once. Their debt was mature; there would have been a handsome margin realized by sale. There was a ready market, the collaterals were of a highly unsteady character. They knew that the court had no authority to speculate upon them, and that the object of the bankruptcy was to distribute the estate among the creditors speedily. His duty to the court and the estate was that of a prudent administrator under the circumstances acting for the best interest of his principal. The record shows that defendants were convinced that the collaterals should be sold in February and March, 1872. See record, p. 16.

See Story on Bailments § 332.

Wharton on Negligence, ed. 1874, § 670, says pawnee must exercise the diligence of a good business man, when in his particular circumstances.

Story says that a pawnee is liable for losses and increments when he has refused or omitted to perform his duty. Story on Bailments, § 334.

Equity will compel a sale by pawnee when it is clear that the property will produce more than enough to satisfy the debt. Story on Bailments, § 320.

Story Eq. Jurisprudence, §§ 1031-32-33—such, says Story, is the civil law, and such is the law of Louisiana.

See Williams v. the Schooner St. Stephen, 2 N. S. p. 24. where the court held "that it results from the contract, that if the debtor has any rights in the thing, he should have the means of enforcing them; and it is the only means of preventing injustice and oppression. If the creditor is not paid, the law makes it his duty to apply to a court of justice, and have the object appraised or sold. If he will do neither, but continue to hold in his posses-

sion the collaterals of greater value than his debt, we are satisfied that the debtor or those in his right can compel him to comply with that which the law declared to be his duty to do."

We have seen that the code forbids the creditor to appropriate the pawn. If he were permitted to hold securities of greater value than the debt, until by fluctuations of the market they were reduced below the debt, and then sell them, he could practically appropriate the pawn.

His duty to the pledger is that of *diligens paterfamilias*.

See Hartman v. Bemiss, 16 Louisiana Rep. 145.
Crocker v. Monrose, 18 Louisiana Rep. 556.
The Commercial Bank of New Orleans v. Marten, *et als*, 1 La. Annual, 444.
Godfrey Stancil vs. Gilmore & Henderson, 6 La. Annual, 763.
Evans vs. Hatcher, 10 La. Annual, p. 99.

In Tyler on Usury, p. 610, it is laid down as a general rule of law, that where a person receives bonds and notes for collection as collateral security for a debt, he is bound to use due diligence, and if they are lost through his negligence by the insolvency of the makers, he is chargeable with the amount.

In re Grinnell 9, N. B. R., 137, Judge Blatchford held that where stock was held to secure call loans, the pledgee need not obtain an order of court in bankruptcy to sell the stock pledged, and pay the surplus into court for the benefit of whom it may concern.

See also *In re* Daniel, 13 N. B. R.

In Louisiana, a wrongful assumption of a right over the property of another is a conversion—and all who convert the property of another are in bad faith.

See 7 Louisiana Annual 487, Badilo vs. Tio.
2 do 281, The Draining Co. vs. Lizardi et als.

The refusal, neglect or omission of defendants to sell when their debts were due, and there was a margin in the collaterals, at the instance of the Missouri Court, who demanded a sale, and defendants convinced that a sale should be made at the time, was a conversion of the surplus at least for which they became liable under the law of Louisiana and the bankrupt act to the assignee, whose title related back.

Under the code practice in Louisiana there are no distinctions in actions. They are all civil actions. While Trover is unknown, yet an equitable action for damages in such cases are allowed under the flexible system in that State, wherein the court can grant suitable redress; and it is respectfully submitted that in the court below judgment should have been rendered for plaintiff in damages for at least the sum of $15,769.78, being the surplus which could have been realized by the sale of the pledges on the 27th of February, 1872, after payment of the notes for $15,800 and $12,500 and the amount left after deducting the usurious interest and commissions from the note for $26,719.25, which would reduce the amount of the note to $14,241.22, making an aggregate indebtedness of $42,541.22, for which the pledges in warrants $77,748.35 at 72 per cent. would amount in money to $58,311.

GIVEN CAMPBELL,

Attorney for Appellants.

Supreme Court of the U. S.

NO. 192.

JAMES E. YEATMAN & JAMES C. MOORE
assignees in bankruptcy of
O'FALLON & HATCH,
plaintiffs in error,
vs.
SAMUEL SMITH & CO.

Brief on behalf of defendants in error.

This suit is for the assented value on 28 February, 1871, of securities pledged to defendants by O'Fallon & Hatch, the bankrupts. A receiver appointed *ex parte*, by the Bankrupt Court, in Missouri, had, on that day, demanded the securities unconditionally, which was refused, though the defendants offered to deliver upon the payment of amount due them, secured by pledges.

A similar demand was made by the assignee in May, 1871, and with a like refusal.

The plaintiffs aver a conversion as the consequence of this refusal.

The suit is at law. A jury was waived and the case submitted to the Court, which found the facts stated in the record, and thereupon entered judgment in favor of defendants.

Five grounds of error are assigned in record.

1st. General, without specification;

2d. In admitting evidence of debt without prior proof

in the bankruptcy proceeding, as stated in bill of exceptions;

3d. In recognizing defendants as creditors when they failed and refused to prove up the debts in bankruptcy;

4th. Because the facts and law showed a conversion of the property;

5th. A repetition of the third in different language;

In this Court the plaintiffs have presented three general propositions:

1st. That the filing of the petition in baukruptcy has the effect to bring all the bankrupts property into Court;

2d. That the creditor of whatever class, secured as well as unsecured, must file a proof in the Bankrupt Court; and under this head he contests portion of defendants claim, on the ground that it is composed of usurious charges;

3d. That the defendants ought to have sold the collaterals pledged.

We present the following:

Points.

I.

The defendants held as pledgees, and their rights to possession as such could not be divested by pledgor without payment.

Rev. Code La., 3164. "The creditor who is in possession of the pledge can only be compelled to return it, but when he has received the whole payment of the principal, as well as the interest and costs."

II.

The *Assignee* or Receiver has no greater authority than the debtor they represent.

Partee, Syndic vs. *Corning*, 9 An., 539.

Gibson vs. *Warden*, 14 Wall., 250.
Cook vs. *Tullis*, 18 Wall., 332.
Mitford vs. *Mitford*, 9 Vesey, Jr., 88.

III.

The Receiver, Matthews, was appointed *ex parte*, and by the terms of his mandate, had no right to demand the pledged securities. He had power *under the order* over none but such warrants "as may be delivered to him for that purpose by the holders thereof."

IV.

A Receiver is not known under the Bankrupt Law.

Such officer could only be appointed in a proceeding in which persons to be affected are made parties.

This appointment was made in the bankrupt proceedings, and could have no effect except as regards the property in the possession of the bankrupts, or such as might be voluntarily delivered. Such was its intent.

V.

The *Assignee* could not by an *ex parte* order require the delivery of a thing pledged. Nor in the bankruptcy by rule.

Smith vs. *Mason*, 14 Wall., 419.
Marshall vs. *Knox*, 16 Wall., 551.
Jerome vs. *McCarter*, 94 U. S., 737.
Eyster vs. *Gaff*, 91 U. S., 521.
A fortiori, the Receiver.

And stronger still, can neither peremptorily demand the delivery, and on refusal, treat the pledgee as a converter of the pledge.

VI.

The Assignee takes only what the bankrupt had at the date of filing the petition.

Adverse holder to the latter is likewise to former.

Re McKay, 1 Lowell, 346.

Re Griffiths, 1 Lowell, 431.

"The Assignee of a bankrupt is not the Assignee of his creditors. He is not the Assignee of all the judgments, executions, liens, and mortgages, outstanding against the bankrupt's property. He takes only the bankrupt's interest in property; he has no right or title to the interest which others parties have therein, nor any control over the same, farther than is given to him by the Bankrupt Act, as auxiliary to the preservation of the bankrupt's interest for the benefit of his general creditors. It would be absurd to contend that the Assignee in bankruptcy becomes *ipso facto* seized and possessed in entirely as trustee of every article of property in which the bankrupt has any interest or share. This would give him the king's prerogative which brooks not a divided dominion in property in common with a subject."

Judge BRADLEY, *Goddard, Assignee* vs. *Weaver*, 1 Wood's Rep., 260.

Marshall vs. *Knox*, 16 Wall., 558.

Eyster vs. *Gaff*, 91 U. S., 525.

VII.

There is no rule of law requiring the creditor or adverse possessor when assailed, as a condition precedent, in order to defend, to make proof in the bankruptcy proceeding.

The rule as to proof, has relation to dividends of the general fund and in bankruptcy.

The question of proof was not involved in the January and February discussions.

VIII.

A question of usury is not raised by the pleadings, nor

could it be in an action for conversion. Here the simple question is, had the defendants, or not, the right of retention. Nothing was tendered, though a large indebtedness is admitted which is secured by the pledge.

IX.

If there was usury in the dealings with O'Fallon & Hatch, they were more than a year antecedent to this action, and in the greater part anterior to the alleged commission.

X.

The claims of the defendants are all in notes. The following dispositions of law in Louisiana, found in the Revised Code, dispose effectually of the charge of usery. The second paragraph is from the Act No. 62, of March 20, 1356, and the 3d from the Act No. 62, March 2, 1860.

ARTICLE—2941.

Except in the cases herein provided, if any person shall pay on any contract a higher rate of interest than the above, as discount or otherwise, the same may be sued for and received within twelve months from the time of such payment.

The owner or discounter of any note or bond, or other written evidence of debt for the payment of money, payable to order or bearer or by assignment, shall have the right to claim and recover the full amount of such note, bond, or other written evidence of debt, and all interest—not beyond eight per cent. per annum interest—that may accrue thereon, notwithstanding that the rate of interest or discount at which the same may be or may have been discounted has been beyond the rate of eight per cent.

per annum interest or discount; but this provision shall not apply to the banking institutions of this State in operation under existing laws.

The owner of any promissory-note, bond, or other written evidence of debt for the payment of money to order or bearer, or transferable by assignment, shall have the right to collect the whole amount of such promissory-note, bond, or other written evidence of debt for the payment of money, notwithstanding such promissory-note, bond, or other evidence of debt for the payment of money may include a greater rate of interest or discount than eight per cent. per annum, provided such obligation shall not bear more than eight per cent. per annum after maturity until paid.

XI.

The question as to the non sale of the collatterals by defendants as a breach of duty. This is not charged in the petition, nor could it have been in this form of action; and furthermore, it is inconsistent with the claim of exclusive control of the property in plaintiffs.

But the following Article of Revised Code, No. 3165, up to February 23d, 1872, forbade sale by pledge.

"The creditor cannot, in case of failure of payment, dispose of the pledge * * * but is compelled to obtain a judgment in the ordinary cause of law, and the same formalities in all respects shall be observed in the sale of property so pledged as in ordinary cases.

Any clause which should authorize the creditor to appropriate the pledge himself or dispose thereof without the usual formalities, shall be null.

The Act of Februrary 23d, 1872, amended and revised the Article as follows:

No. 9.

An Act, page 36, to amend and re-enact Article 3165 of the Revised Code.

SECTION 1. Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assemby convened, that Article 3165 of the Revised Civil Code be amended and re-enacted so as to read as follows: The creditor cannot in case of failure of payment dispose of the pledge; but when there have been pledges of stock, bonds, or other property for the payment of any debt or obligation, it shall be necessary before such stocks, bonds, or other property so pledged, shall be sold for the payment of the debt for which said pledge was made, that the holder of said pledge be compelled to obtain a judgment in the ordinary course of law, and the same formalities in all reports shall be observed in the sale of property so pledged as in ordinary cases: but in pledges of movable property, or rights, or credits, stocks, bonds, or other movable property, it shall be lawful for the pledger to authorize the sale or other disposition of the property pledged in such manner as may be agreed upon by the parties without the intervention of courts of justice, provided that all existing pledges shall remain in force and be subject to the provisions of this act.

XII.

There is no rule of pratice in Louisiana ta sustain in this form of action, or under these pleadings, the claims against defendants asserted, other than for conversion.

The liberal rules of pleading and practice therc, present no warrant as asserted.

If there has been no conversi on there is no occasion for inquiry farther.

XII.

The case is at law and governed by the rules theref.

The Courts of the United States in Louisiana as well as all other States, distinguish law and equity, however the jurisdiction may be blinded in the Courts of the State.

XIV.

There is no error in the judgment and it should be affirmed.

THOMAS ALLEN CLARKE,
For Defendant in Error.